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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-80

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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IN THE

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GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

This is an appeal from a judgment of the Court of Appeals for the Third Circuit sitting *en banc* entered on July 8, 1974. The judgment reversed the order of the District Court for the District of New Jersey which dis-

missed respondent's complaint and denied his application for a preliminary injunction. The judgment of the Court of Appeals, which was issued in lieu of a formal mandate, directed the District Court to conduct an evidentiary hearing and set forth its conclusions in the form of a declaratory judgment.

Opinions Below

The opinion of the Court of Appeals for the Third Circuit sitting *en banc* has been reported and appears in the Appendix (A123). *Helfant* v. *Kugler,* 500 F.2d 1188 (3 Cir. 1974). The prior opinion of a three judge panel of the Court of Appeals for the Third Circuit has been published and appears in the Appendix (A102). *Helfant* v. *Kugler,* 494 F.2d 1299 (3 Cir. 1973). The oral opinion of the District Court for the District of New Jersey dismissing respondent's complaint and denying preliminary injunctive relief also appears in the Appendix (A97).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The order of the United States District Court for the District of New Jersey was entered on May 9, 1973. A three judge panel of the Court of Appeals for the Third Circuit thereafter reversed the District Court's order on September 10, 1973. On September 21, 1973, the Court of Appeals granted petitioners' application for a rehearing. Subsequently, the Court, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, and at petitioners' request, consented to a consideration of the matter *en banc.*

The judgment in lieu of a formal mandate was issued by the Court of Appeals for the Third Circuit *en banc* on July 8, 1974. Petitioners' application for a recall of the mandate was granted on July 23, 1974. Issuance of the mandate was stayed until August 7, 1974 to permit petitioners to file a petition for a writ of certiorari. Following petitioners' application, respondents filed a cross-petition. This Court granted the petition and cross-petition on November 18, 1974.

Questions Presented

1. Whether the "extraordinary circumstances" exception to the *Younger* v. *Harris* interdiction constitutes a distinct category supporting federal intervention in a pending state criminal prosecution in the absence of an allegation of "harassment" or "bad faith"?

2. Whether the New Jersey Supreme Court's inquiry into respondent's intention to continue to serve as a member of the judiciary during the pendency of a grand jury investigation pertaining to his activities constituted such extraordinary circumstances as to justify federal intervention in a pending state criminal prosecution?

3. Whether federal intervention in a pending state criminal prosecution was permissible where the courts of the State of New Jersey were fully capable of fairly adjudicating respondent's constitutional claims?

4. Whether the Fifth Amendment privilege against self-incrimination is violated where lawful governmental processes have the unintended effect of overbearing an individual's will and causing him to testify?

5. Whether federal intervention was permissible to enjoin a pending state criminal prosecution on charges of

false swearing on the ground that allegedly compelled testimony formed the basis for the criminal prosecution?

6. Whether federal intervention in pending state criminal prosecution was permissible to resolve factual disputes in advance of constitutional necessity in the absence of an allegation of great, immediate and irreparable injury?

Constitutional Provisions and Statutes Involved

Constitution of the United States, Article III, Section 2, Clause 1:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution . . . ."

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

Constitution of the United States, Amendment XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property without due process of law. . . ."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 1:

> "The Supreme Court shall consist of a Chief Justice and six Associate Justices. Five members of the court shall constitute a quorum. When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior service, as provided by rules of the Supreme Court. In case the Chief Justice is absent or unable to serve the presiding Justice designated in accordance with rules of the Supreme Court shall serve temporarily in his stead."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 2:

> "The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution."

Constitution of the State of New Jersey, Article 6, Section 2, paragraph 3:

> "The Supreme Court shall makes rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

N.J.S.A. 2A:1B-1:

> "2A:1B-1 Definitions
>
> 'Judge' as used herein means any judge of the superior court, county court, county district court, juvenile and domestic relations court and municipal court."

N.J.S.A. 2A:1B-2:

> "2A:1B-2. Cause for removal
>
> A judge may be removed from office by the Supreme Court for misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence."

N.J.S.A. 2A:1B-3:

> "2A:1B-3. Institution of removal proceedings
>
> A proceeding for removal may be instituted by either house of the Legislature acting by a majority

of all its members, or the Governor, by the filing of a complaint with the clerk of the Supreme Court, or such proceeding may be instituted by the Supreme Court on its own motion."

N.J.S.A. 2A:1B-4:

"2A:1B-4. Prosecution of removal proceedings

The Attorney General or his representative shall prosecute the proceeding unless the Supreme Court shall specially designate an attorney for that purpose."

N.J.S.A. 2A:1B-5.

"2A:1B-5. Suspension pending determination

The Supreme Court may suspend a judge from office, with or without pay, pending the determination of the proceeding; provided, however, that a judge shall receive pay for the period of suspension exceeding 90 days."

N.J.S.A. 2A:1B-6.

"2A:1B-6. Preparation of defenses; counsel, production of witnesses and evidence

The judge shall be given a reasonable time to prepare his defense and shall be entitled to be represented by counsel. The prosecuting attorney and the judge shall have the right of compulsory process to compel the attendance of witnesses and the production of evidence at the hearing."

N.J.S.A. 2A:1B-7.

"2A:1B-7. Taking of evidence

Evidence may be taken either before the Supreme Court sitting en banc, or before three justices or

judges or a combination thereof, specially designated therefor by the Chief Justice."

N.J.S.A. 2A:1B-8:

"2A:1B-8. Rules governing

Except as otherwise provided in this act, proceedings shall be governed by rules of the Supreme Court."

N.J.S.A. 2A:1B-9.

"2A:1B-9. Removal

If the Supreme Court finds beyond a reasonable doubt that there is cause for removal, it shall remove the judge from office. A judge so removed shall not thereafter hold judicial office."

N.J.S.A. 2A:1B-10.

"2A:1B-10. Suspension prior to hearing

No hearing to remove a judge from office as provided for in this act shall be held until the cause for suspension, if the cause is a result of an independent civil, criminal or administrative action against the judge, is finally decided in a tribunal in which the judge had an opportunity to prepare his defense and was entitled to be represented by counsel."

N.J.S.A. 2A:1B-11:

"2A:1B-11. Impeachment proceedings

The actions of the Supreme Court may not extend further than removal from office, but proceedings under this act shall not preclude the institution of impeachment proceedings against a judge pursuant

to Article VII, Section III of the Constitution or subjecting a judge to such criminal or penal proceedings as may be authorized by law."

N.J.S.A. 2A:131-4:

"2A:131-4. False swearing; offense stated.

Any person who willfully swears falsely in any judicial proceeding or before any person authorized by any law of this state to administer an oath and acting within his authority, is guilty of false swearing and punishable for a misdemeanor."

New Jersey Rules of Evidence, Rule 8(3):

"In the case of a statement against the penal interest of the defendant on trial in a criminal proceeding, the judge, if requested, shall hear and determine the question of its admissibility out of the presence and hearing of the jury. In such a hearing the rules of evidence shall apply and the burden of proof as to admissibility of the statement is on the prosecution. . . ."

New Jersey Rules of Evidence, Rule 63(10):

"A statement is admissible if at the time it was made it was so far contrary to the defendant's pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that such a statement is not admissible against a defendant other than the declarant in a criminal prosecution."

New Jersey Court Rules, R. 1:12-1:

"*Rule* 1:12. Disqualification and Disability of Judges

1:12-1. Cause for Disqualification; On the Court's Motion

The judge of any court shall disqualify himself on his own motion and shall not sit in any matter, if he

(a) is by blood or marriage the second cousin of or is more closely related to any party to the action;

(b) is by blood or marriage the first cousin of or is more closely related to any attorney in the action. This proscription shall extend to the partners, employers, or office associates of any such attorney except where the Chief Justice for good cause otherwise permits,

(c) has been attorney of record or counsel in the action; or

(d) has given his opinion upon a matter in question in the action; or

(e) is interested in the event of the action; or

(f) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.

Paragraphs (c), (d) and (e) shall not prevent a judge from sitting because he has given his opinion in another action in which the same matter in controversy came in question or given his opinion on any question in controversy in the pending action in the course of previous proceedings therein, or be-

cause the board of chosen freeholders of a county or the municipality in which he is a resident or liable to be taxed are or may be parties to the record or otherwise interested."

New Jersey Court Rules, R. 1:12-2:

"1:12-2. Disqualification on Party's Motion

Any party, on motion made before trial or argument and stating the reasons therefor, may apply to a judge for his disqualification."

New Jersey Rules of Court, R. 1:12-3:

"1:12-3. Proceedings in the Trial Courts in the Event of Disqualification or Inability

(a) Before or After Trial; Designation. In the event of the disqualification or inability for any reason of a judge to hear any pending matter before or after trial, another judge of the court in which the matter is pending or a judge temporarily assigned to hear the matter shall be designated by the Chief Justice or by the Assignment Judge of the county where the matter is pending except that in the municipal court, the disqualified or disabled judge shall himself in writing designate the acting judge, subject to the Assignment Judge's approval, if the designee is not himself a judge of a municipal court.

(b) During Trial. If a judge is prevented during a trial from continuing to preside therein, another judge may be designated, as provided in paragraph (a), to complete the trial as if he had presided from its commencement, provided, however, that he is

able to familiarize himself with the proceedings and all of the testimony therein through a complete transcript thereof.

(c) Disposition in the Interest of Justice. No substituted judge shall continue the trial in any matter pursuant to this rule unless he is satisfied, under the circumstances, that he can fairly discharge his duties, and if not so satisfied, he shall make such disposition as the circumstances warrant, as where trial has taken place, by ordering a new trial or, in a case tried without a jury, by directing the recall of any witness.

Statement of the Case

This is an appeal from a decision rendered by the Court of Appeals for the Third Circuit sitting *en banc* reversing an order of the United States District Court dismissing respondent's complaint and denying his application for preliminary injunctive relief. Three judges dissented. The judgment issued in lieu of a formal mandate was recalled and stay pending certiorari proceedings. This court granted petitioners' application for a writ of certiorari and respondent's cross-petition on November 18, 1974.

The material facts are not in dispute and are essentially a matter of official record. Respondent Helfant, a member of the New Jersey Bar and a former municipal court judge,[1] alleged in a verified complaint (see 18 U.S.C. §1343

[1] In New Jersey, municipal court judges may practice law and need not devote their full time to their official duties. See N.J.S.A. 2A:8-8 and R. 1:15-1(c). However, they may not practice in any "criminal, quasi-criminal or penal matter." R. 1:14-1(c).

(3) and 42 U.S.C. §1983) that he was subpoenaed to appear before the State Grand Jury on October 18, 1972 (A61). The subject under investigation by the grand jury concerned a criminal complaint for atrocious assault and battery upon two victims lodged in a municipal court in which Judge Samuel Moore presided (A61). Respondent allegedly represented one of the victims and caused the complaint to be filed against one John Cantoni for the purpose of extracting money from him. The charge of atrocious assault and battery being an indictable offense,[2] the municipal court had no jurisdiction to hear the matter,[3] and could dismiss the complaint only with the consent of the County Prosecutor (A24). Nevertheless, the complaint was dismissed without the Prosecutor's knowledge, after Cantoni paid an intermediary $1,500, plus an additional $200 allegedly for Judge Moore (A21).

Pursuant to the subpoena, respondent appeared before the State Grand Jury on October 18, 1972, and was advised that he was the target of an investigation (A61).[4] Armed

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[2] N.J.S.A. 2A:90-1.

[3] In New Jersey, municipal court judges have jurisdiction to conduct probable cause hearings. If probable cause is found to exist, the defendant is "bound over" to await final determination of the cause. R. 3:4-3.

[4] Unlike many jurisdictions, New Jersey case law provides that a witness who is a target of a grand jury inquiry must be apprised of that fact. See, *e.g., In re Addonizio*, 53 N.J. 107, 117, 248 A.2d 531, 536 (1968); *In re Boiardo*, 34 N.J. 599, 604-06, 107 A.2d 816, 818-20 (1961); *State* v. *DeCola*, 33 N.J. 335, 350-52, 164 A.2d 729, 736-37 (1960). When a witness is thus a target, no more need appear to support his Fifth Amendment claim. *In re Addonizio, supra*, at 117, 248 A.2d at 536; *State* v. *Fary*, 19 N.J. 431, 438-39, 117 A.2d 499, 503-04 (1955).

with that information and pursuant to his attorney's advice, respondent invoked his Fifth Amendment privilege against self-incrimination and refused to testify (A61). Nevertheless, respondent Helfant's appearance before the grand jury and his possible involvement in the pending investigation eventually reached the attention of the New Jersey Supreme Court. Upon receiving notice, the Administrative Director of the Courts, in accordance with settled practice, informed the members of the Supreme Court. The Administrative Director was then instructed to obtain a report from the Deputy Attorney General handling the matter and all relevant grand jury testimony.[5] The material was obtained and revealed in substance, the allegations against Judge Helfant and Judge Moore recounted above.[6]

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[5] Under New Jersey law, grand jury minutes are in the exclusive custody of the judiciary. See, *e.g., In re Jeck*, 26 N.J. Super. 514, 98 A.2d 319 (App. Div. 1953).

[6] These facts were set forth in our petition for a writ of certiorari (P12-13). In his cross-petition, respondent argued that this material was *dehors* the record (C.P.18, fn. 4). He subsequently moved to dismiss our petition. This Court denied respondent's motion on the same day that it granted the petition and cross-petition for a writ of certiorari. We contend that these facts, which are contained in the official records of the Administrative Office of the Courts, may be judicially noted. See, *e.g., Fletcher* v. *Norfolk Newspapers*, 239 F.2d 169 (4 Cir. 1956). *Cf. Market St. Ry. Co.* v. *Railroad Comm'n*, 324 U.S. 548 (1945); *Gomez* v. *Wilson*, 477 F.2d 911 (D.C.Cir. 1973); *United States* v. *Meyer*, 462 F.2d. 822 (D.C.Cir. 1972); *Paul* v. *Dade Co. Florida*, 419 F.2d. (5 Cir. 1969); *Wagner* v. *Fawcett Publications*, 307 F.2d. 409 (7 Cir. 1962). See also Rule 201, *Proposed Rules of Evidence for United States Courts and Magistrates*. In any event, respondent in his cross-petition expressly alluded to the

(Footnote continued on following page)

In the meantime, it had become apparent that the grand jury's investigation encompassed other matters in which respondent was involved (A63). Shortly after his initial appearance, respondent was again subpoenaed to testify before the grand jury at 10:00 A.M. on November 8, 1972 (A62). The Supreme Court had scheduled oral arguments on pending appeals for that date and, therefore, directed the Administrative Director to ask both Judge Helfant and Judge Moore to meet with it at its private conference room on that day (A62). The purpose of this meeting was to discuss with the two judges whether they should sit pending resolution of the grand jury investigation. Both of them appeared as requested and each met separately with the Court (A173). Both Judge Helfant and Judge Moore agreed not to sit in their respective courts until the completion of the grand jury investigation and the resolution of any charges which might emerge.[7] Their agreement not to sit obviated the need to consider whether formal proceedings should be instituted for their interim suspension. Although no order of their suspension was entered, the records of the courts show that neither man sat in his official capacity following the meeting of November 8, 1972.

(Footnote continued from preceding page)

fact that the New Jersey Supreme Court requested and received the transcript of the State Grand Jury proceedings. It is also significant that these matters were included in the allegations set forth in respondent's complaint (A63). Obviously, respondent concedes the veracity of these statements. Nevertheless, this Court may simply disregard these facts if it finds that they were improperly included in our petition.

[7] In his testimony before the United States District Court, Helfant said: "I am a municipal court judge in two municipalities but I have taken a voluntary leave of absence from both judgeships" (A83).

The federal complaint filed by Helfant alleged isolated incidents with respect to the meeting with the Supreme Court, but did not attempt to indicate their context. More precisely, respondent did not reveal the purpose of the meeting so that its significance could be evaluated. Candor required of one who seeks equitable relief surely demanded that Helfant either disclose the stated purpose or allege that none was revealed if it be so claimed. Yet, although respondent alleged that when he was asked to meet with the Court, he tried unsuccessfully to learn from the Administrative Director the purpose of the meeting, he did not contend that he was not so advised by the Supreme Court (A62). Nevertheless, that he was told that the purpose was to discuss whether he should continue to sit pending the disposition of the charges is inferable from his testimony that Chief Justice Weintraub said the Court was not interested in hearing the merits of the underlying controversy from Helfant (A86).

In any event, according to the allegations in the complaint, respondent was ushered into the Supreme Court's conference room where all of the justices were assembled (A62). Chief Justice Weintraub inquired of respondent whether he thought it proper for a judge sitting in criminal cases to invoke the Fifth Amendment privilege against self-incrimination[8] (A62). This was followed by a question propounded by Justice Mark A. Sullivan as to whether respondent had continued to preside following his invocation of the Fifth Amendment (A62-63). Justice Sullivan also asked whether respondent felt it appropri-

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[8] Chief Justice Weintraub has since retired as have two other justices who were present at the conference. Thus, only four of the seven justices who were present at the conference with Helfant are presently members of the Supreme Court.

ate to adjudicate the rights of others when he had refused to testify regarding his own activities (A62).

Although respondent's complaint alleged that both Chief Justice Weintraub and Justice Sullivan inquired into his prior assertion of the Fifth Amendment, he did not allege that any member of the Court suggested that he testify or offered any promise or threat if he did or did not testify (A90). The Fifth Amendment was not the focus of the meeting. Judge Moore, who had already testified freely before the grand jury, and Judge Helfant who had not, were dealt with in precisely the same fashion. Both agreed not to sit (A83). Nor did respondent ask to be relieved of that agreement after he testified before the grand jury, thus making it evident that nothing turned upon whether he chose to speak or be silent. Thus, respondent said in an affidavit annexed to the complaint, "I cannot say that the Supreme Court in any way directed me to testify, nor did they in any way indicate to me what the consequences would be if I continued to stand by the Fifth Amendment" (Affidavit 4).

The complaint referred to other questions concerning Helfant's association with one Abe Schusterman, a State's witness who had previously appeared before the grand jury (A63). The focus of this inquiry related to allegations that Helfant and Schusterman had bribed an Atlantic County Court judge in a criminal case. As previously noted, Chief Justice Weintraub cautioned respondent not to discuss the merits of the Attorney General's investigation (A86). The import of the Chief Justice's remarks was that he was solely concerned with respondent's ability to continue to actively serve as a municipal court judge during the pendency of the grand jury investigation. Respondent informed the Court that he intended to cooperate with the grand jury and to testify (A64). Helfant alleged in his complaint that petitioner, Joseph Hayden,

who was conducting the grand jury investigation, entered the Supreme Court chambers as he was leaving (A65).

Following this conference, respondent proceeded to the grand jury room where he subsequently waived his Fifth Amendment privilege and responded to questioning. According to the complaint, Helfant was "emotionally upset" by virtue of his prior confrontation with the Supreme Court justices and testified only because he feared that he would otherwise be removed from office and disbarred (A64). As previously noted, he admitted, however, that none of the justices had threatened to take disciplinary action against him unless he waived his Fifth Amendment privilege (Affidavit 4). In any event, the import of respondent's testimony was wholly exculpatory (A33-41). Nevertheless, the grand jury subsequently returned an indictment charging respondent with conspiracy to obstruct justice (N.J.S.A. 2A:98-1), obstruction of justice (N.J.S.A. 2A:85-1), compounding a felony (N.J.S.A. 2A:97-1) and four counts of false swearing (N.J.S.A. 2A:131-4) (A18, *et seq.*).

Based upon these allegations, respondent sought a preliminary and a permanent injunction enjoining the Attorney General and others from prosecution of the indictment. Respondent's action was grounded upon his conclusory allegation of collusion between the Supreme Court and the Attorney General's office (A66). The Supreme Court's interest in the outcome of his case, according to Helfant, prevented him from having his constitutional claims fairly adjudicated in the State system and precluded the possibility of a fair trial (A66).

Petitioners moved pursuant to Rule 12(b)(6), *Fed. R. Civ.P.*, to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court thereafter conducted an evidentiary hearing with re-

spect to respondent's motion for a preliminary injunction. Following respondent's presentation of evidence, the district court denied injunctive relief and dismissed the complaint for failure to state a claim (A97). Noting that federal intervention was impermissible under the guidelines of *Younger* v. *Harris,* 401 U.S. 37 (1971), the court concluded that the prosecution was not instituted in bad faith or for the purpose of harassment and that respondent was not threatened with immediate or irreparable injury (A97-99). Significantly, the district court found that respondent's constitutional claim could properly be adjudicated by the New Jersey judiciary (A98). Specifically, the district court concluded that the involvement of members of the New Jersey Supreme Court in respondent's disciplinary proceedings did not impair their ability to fairly consider the merits of the pending criminal prosecution (A99). Further, the court was unwilling to presume that other members of New Jersey's judiciary would be infected by the Supreme Court's alleged interest in respondent's case. The court thus found it unnecessary to resolve the issue of whether respondent's testimony before the grand jury was the product of his free and unconstrained will.

A three judge panel of the Court of Appeals reversed the district court's order on September 10, 1973, and remanded for further proceedings (A102). Citing the inability of the New Jersey Supreme Court to impartially resolve respondent's constitutional claim, the order dismissing the complaint and denying respondent's application for injunctive relief was vacated (A119). The case was remanded to the district court for a hearing on respondent's motion for a preliminary injunction, and for a trial on the merits (A119). The court's conclusion was bottomed upon an assumption that the Supreme Court's prior involvement in respondent's case prevented the State courts from resolving the issues raised (A115).

Lacking a forum in the State courts, the court concluded that respondent's allegation of coercion could only be decided by the federal judiciary.

Petitioners thereafter petitioned the Court of Appeals to recall its mandate and applied for a rehearing, suggesting that the matter be heard *en banc.* See Rules 35 and 40, *Fed.R.App.P.* Because of the significant federal-state comity questions raised in petitioners' application, the full Court of Appeals subsequently agreed to hear the case (A120-122). On July 8, 1974, the court reversed the district court's order, three judges dissenting (A123). Although rejecting respondent's application for an injunction, the majority directed that the case be remanded to the district court "for the entry of an order temporarily enjoining" the trial of the State indictment and for "a determination of whether [respondent's] testimony before the grand jury" was coerced (A167). In reaching this conclusion, the majority opinion did not distinguish between the substantive offenses and the false swearing charges contained in the indictment. Presumably, the court concluded that a finding of "involuntariness" by the district court would preclude the prosecution of respondent for false swearing and would prevent the State from introducing the allegedly tainted testimony at trial. In any event, the court directed the district court to conduct an evidentiary hearing and to set forth its conclusions in the form of a declaratory judgment. This appeal followed.

Summary of Argument

The Court of Appeals' *en banc* decision tears at the very roots of "Our federalism." Its effect is to paralyze the administration of a state judicial system and disrupt its criminal processes. At stake is the prerogative of a

state to effectively administer its laws. It goes without saying that federal interference of this magnitude is inherently abrasive. *Younger* v. *Harris*, 401 U.S. 37 (1971).

This case presents the novel question of what constitutes "extraordinary circumstances" within the meaning of *Younger* v. *Harris, supra.* Specifically, at issue is whether the "extraordinary circumstances" exception to the *Younger* interdiction was intended to establish a distinct category justifying federal intervention in a pending state criminal prosecution, or to be merely descriptive of the traditional standards of "bad faith" or "harassment." This Court has never delineated the contours of the "extraordinary circumstances" exception and scattered statements seem to indicate doubt on the part of some justices that such a distinct class exists. See, *e.g.*, Mr. Justice Black's opinion in *Perez* v. *Ledesma,* 401 U.S. 82, 85 (1971) and Mr. Chief Justice Burger's opinion in *Allee* v. *Medrano,* —— U.S. ——, ——, 94 S.Ct. 2191, 2209 (1974). If a separate category exists at all, it must be equated with the unavailability of a state forum for vindication of the claimed constitutional deprivation. See Mr. Justice Brennan's opinion in *Perez* v. *Ledesma, supra* at 93.

The majority opinion is premised on the view that the "extraordinary circumstances" exception constitutes a distinct category supporting federal intervention in a pending state criminal prosecution. On this basis alone, the issues raised here are highly significant. Assuming the existence of such a separate category, the majority grievously erred in finding that this case fell within its purview. If, as the court below stated, the concern was merely with the appearance of impropriety on the part of the New Jersey Supreme Court, such grounds manifestly do not warrant federal intervention. Alternatively, if the

majority opinion is read to mean that the factual involvement of the Supreme Court would destroy the objectivity of the entire State court system in processing respondent's constitutional claims, the decision is clearly incorrect. So interpreted, the court's decision reveals a substantial misunderstanding of the State Supreme Court's constitutional and statutory obligations and the manner in which these duties are discharged. Plainly, there was nothing ominous in the Supreme Court's conference with respondent. The purpose of that meeting was to determine whether respondent intended to sit as a municipal court judge during the pendency of the grand jury's investigation into his activities. It is the constitutional duty of the Supreme Court to administer the judicial system and to protect the public from the misbehavior of judges and attorneys. See *Constitution of New Jersey,* Article 6, Section 2, paragraph 3, N.J.S.A. 2A:1B-1, *et seq.* The Court's duty to preserve the appearance and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. It is consonant with that obligation to determine whether the public interest requires the interim suspension of a judge (or a lawyer). In that connection it is not extraordinary to solicit the judge's (or the attorney's) view as to whether a suspension would be self-imposed, failing which the Court might, depending upon circumstances, proceed formally to that end. While such inquiries may serve to embarrass and even unnerve individual members of the bar, no malevolent purpose can be imputed. The mere fact that the Supreme Court is duty-bound to initiate disciplinary and removal proceedings does not render its members incapable of subsequently adjudicating the merits of related criminal convictions. Further, it is a slur on the entire State judicial system to presume that an individual judge incapable of remaining impartial would not abide by settled New Jersey practice

and disqualify himself. R. 1:12-1 and R. 1:12-2. Simply stated, there is no reason to assume that the State courts do not provide, in appearance and in fact, a proper forum for vindication of respondent's constitutional claim.

Even assuming the wholesale contamination of New Jersey's judicial system, the court below nevertheless erred. Respondent's complaint failed to allege a constitutional injury that was "both great and immediate." See *Younger* v. *Harris, supra* at 46. A crucial aspect of *Younger's* limitation upon incursions into state proceedings has thus not been satisfied. The equity jurisdiction of the federal courts may not be invoked to permit a flanking movement against the system of state courts. See *Stefanelli* v. *Minard,* 342 U.S. 117 (1951); *Fenner* v. *Boykin,* 271 U.S. 240 (1926).

Federal interference in a state criminal prosecution may be sanctioned, if at all, only when the alleged unconstitutional injury sought to be averted will be "both great and immediate." *Younger* v. *Harris, supra* at 46. See also *Fenner* v. *Boykin, supra* at 243. This recognized doctrine has its genealogy in traditional precepts of equitable restraint and constitutes a *sine qua non* of federal relief. *Fletcher* v. *Bealey,* 28 Ch. 688 (1885). See also Story, *Equitable Jurisprudence,* 377 (1919). The equitable principle that harm must be imminent before an injunction or other form of relief will issue is an integral part of the doctrine of federal non-intrusion. Principles of comity and federalism dictate that only in the most extraordinary circumstances is a federal court warranted in transcending the imprecise boundaries that separate two co-equal judiciaries; this because there is no reason to assume that the state courts have less regard for the Constitution than their federal counterparts. Thus, the drastic measure of federal equitable intervention in an ongoing state

criminal prosecution should be afforded only on the plainest and clearest of grounds. Yet, the majority opinion is grounded solely upon conclusory allegations which fail to state any injury, much less one that is great or immediate. Respondent has not yet suffered any deprivation of his constitutional rights for which a remedy is available in the federal courts. Indeed, there is no reasonable prospect that he ever will.

That this is so can best be illustrated by examining respondent's factual allegations and reviewing the legal consequences which necessarily follow. There is no allegation in the complaint of any conduct on the part of the Supreme Court of New Jersey which could sustain a finding of coercion not to plead the Fifth Amendment. Specifically, the complaint is barren of any allegation that respondent's waiver of his privilege against self-incrimination was the product of governmental misconduct or misbehavior. What must be stressed is that we are not dealing with a Fifth Amendment claim in a due process sense, but with a procedure recognized and established through State constitutional and statutory law. That lawful investigatory conduct may possess a "compelling atmosphere" (*cf. Miranda* v. *Arizona,* 384 U.S. 436, 466 (1966)), or create a "Hobson's choice" for an individual does not necessarily render the procedure violative of due process. *Id.* at 467.

Even if there is a triable issue as to coercion, there is no basis to say that a finding in favor of respondent would avail him of anything. If respondent was coerced into testifying, that would in no sense provide him with a license to lie with impunity. It is well settled that perjury cannot be self-incriminatory, since the scope of the Fifth Amendment privilege extends only to past criminal conduct. *Glickstein* v. *United States,* 222 U.S. 139, 141

(1911). See also *United States* v. *Knox*, 396 U.S. 77, 82 (1969); *Bryson* v. *United States*, 396 U.S. 64 (1969); *Dennis* v. *United States*, 384 U.S. 855 (1966); *United States* v. *Kahriger*, 345 U.S. 22, 32 (1952). Assuming coercion, the compulsion was not to testify falsely, but to testify truthfully. Any other rule would reduce a witness' oath to a meaningless shibboleth. Hence, a finding of coercion would not affect trial on those counts in the indictment charging respondent with false swearing.

With respect to the substantive charges, it is to be emphasized that respondent's testimony before the grand jury was not incriminatory. Therefore, there is little likelihood that his statements will be used against him at trial. In point of fact, no evidentiary doctrine in New Jersey would support admission of respondent's testimony as substantive evidence. Equally important is the Attorney General's stipulation before the Court of Appeals that he would not seek introduction of respondent's grand jury testimony as substantive evidence. That being the case, any constitutional harm alleged in Helfant's complaint is purely hypothetical, and certainly does not qualify as "great and immediate."

In sum, what becomes apparent is that the respondent's claims need never be presented during the trial on the State indictment. Assuming the allegations of the complaint are true, respondent has suffered no harm in the *Younger* sense with respect to the criminal prosecution, and in fact, no harm at all. In short, his claimed Fifth Amendment violation bears no relevance to the State prosecution.

It bears repeating that the issue presented here is not whether a citizen is to be denied access to the federal courts for the disposition of his constitutional claims. As petitioners have maintained throughout these proceedings, a criminal prosecution followed by appeal and petition for certiorari is presumed to be an adequate remedy for even significant constitutional deprivations. Further, federal habeas corpus in the event of a conviction provides an adequate vehicle for vindication of respondent's Fifth Amendment privilege. See 28 *U.S.C.* §2254(d). Thus, respondent is not without a federal forum for resolution of his constitutional claim.

Rather, at issue is the sovereign prerogative to try an accused without delay. It might well be true that the concept of two separate judicial systems is anachronistic and that the federal judiciary should bear the sole responsibility for resolution of all federal constitutional questions. Nevertheless, our Constitution, as presently interpreted, calls for a sharing of that obligation. What is required is a reconciliation of competing social values. Specifically, to be weighed is the right of the state courts to try state cases free of federal interference against the interest of the citizen to immediate disposition of his federal constitutional claims by a federal court. The tension between these competing interests can best be alleviated by declining to permit federal intervention absent compelling reasons. The decision below, however, disrupts and demeans the State process for no other reason "than to assure Helfant of an immediate federal forum for a factual claim that may never ripen into controversy" (A165). Substantial interests of federalism are thus sacrificed not in the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated *instanter*. As such, the decision offends basic considerations of comity. It is respectfully submitted that these significant issues warrant a reversal of the Court of Appeals' decision and a dismissal of respondent's complaint.

REASONS WARRANTING REVERSAL

The New Jersey Supreme Court's inquiry into whether respondent should continue to serve as a member of the judiciary during the pendency of a Grand Jury investigation pertaining to his activities did not constitute such extraordinary circumstances as to justify federal intervention in a pending state criminal prosecution.

A. Introduction.

This case epitomizes the ever-increasing tension between the state and federal courts. At stake is the traditional power of the state judiciary to effectively administer the criminal law, and to ensure the integrity of its bench and bar. That authority has been placed in jeopardy by virtue of respondent's conclusory allegation that members of the Supreme Court of New Jersey will, in the future, refuse to obey the law they are constitutionally bound to enforce. Based upon that allegation, the Court of Appeals ordered the district court to conduct an evidentiary hearing and to determine whether the Supreme Court's inquiry into whether respondent should sit pending resolution of the grand jury investigation, conducted pursuant to its constitutional mandate, violated his Fifth Amendment privilege against self-incrimination. Suffice it to say, the Court of Appeals' decision is, in and of itself, an unwarranted interference with the efficient operation of the State's judiciary.[9] Its officious and unjustified conclusion, standing alone, is inherently abrasive and has an enormous impact on the entire State judicial system, for it seriously impairs the independence of the New Jersey Supreme Court and

[9] Pursuant to the Court of Appeals' remand, respondent has subpoenaed members of the New Jersey Supreme Court to testify at the district court hearing.

threatens its ability to faithfully discharge its constitutional obligations.

The court below itself recognized the significance of the federal-state comity questions presented in this case (A124). It sought to minimize the precedential value of its decision, however, noting that "the operative facts" were peculiar to the State of New Jersey, where its Constitution vests in the Chief Justice and the State's highest court the total and complete administrative control over the entire judicial system (A145). The court further observed that the factual allegations contained in respondent's complaint were *sui generis* and in all likelihood would not recur (A145). The Court thus characterized the impact of its holding as "miniscule" and foresaw no future cases receiving much "precedential nourishment" from its opinion (A146).

Petitioners are constrained to emphatically disagree. Even were the court correct in its assumption that New Jersey's judicial system is indigenous to that State,[10] the

[10] The incidence of such constitutional provisions is not, in fact, limited to New Jersey. Eight states vest plenary administrative authority over judicial officers in the Chief Justice of the State's highest court. *Alaska, Const., Art.* VI, §16; *Arizona, Const., Art.* 6, §3; *Colorado, Const., Art. VI,* §5(2); *Delaware, Const., Art.* 4, §13; *Florida, Const., Arts.* 2 and 5; *Hawaii, Const., Art.* 5, §5; *Illinois, Const. Art.* 6, §16; *Oklahoma, Const.,* Art. VII, §6. Nine states vest in the Chief Justice the power to temporarily assign or transfer at will subordinate judicial officers to any court within the state system: *Alaska, Const., Art.* IV, §16; *Colorado, Const., Art.* VI, §5(3); *Florida, Const., Art.* 5, §12; *Illinois, Const., Art.* 6, §16; *Missouri, Const.,* Art. V, §6; *North Carolina, Const., Art.* IV, §9; *Pennsylvania, Const., Art.* V, §15 (limited to assignment of retired judges); *Washington, Const., Art.* IV, §2(a).

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injury would be no less acute or *de minimus* because it affects but one of fifty jurisdictions. Nor was the court correct in assuming that the factual pattern which emerged in this case might not be a recurring one. In New Jersey, the Supreme Court is duty-bound to inquire into allegations of judicial misconduct, and these investigations do not generally await the conclusion of pending and related criminal charges.[11] Thus, there exists a strong likelihood of continued federal intervention. The majority opinion, therefore, sets an unwholesome and dangerous precedent which warrants reversal.

The decision below emasculates longstanding principles of comity and federalism. It is well settled that our federal system contemplates a policy which permits state courts to try criminal cases free from interference by the federal judiciary. *Younger* v. *Harris,* 401 U.S. 37, 46

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The Oregon Constitution authorizes such transfers but requires enacting legislation. *Ore., Const., Art.* VII, §2(a). The Arizona provision is similar to New Jersey's and is not limited to temporary assignments. *Arizona, Const., Art.* VI, §3. Ten state constitutions provide for direct Supreme Court involvement in removal, suspension and disciplinary proceedings against judicial officers: *Alabama, Const., Art.* VII, §§173, 174; *Alaska, Const., Arts.* 4 and 10 (see also *A.S.* §22.30,070); *California, Const., Art.* IV, §§16, 106; *Colorado, Const., Art.* VI, §23; *Delaware, Const., Art. IV,* §§37; *Florida, Const., Art.* V, §12; *Indiana, Const., Arts.* 4 and 7; *Kansas, Const., Arts.* 3 and 15; *Louisiana, Const., Art.* IX, §§1, 5; *Texas, Const., Art.* XV, §6.

[11] The court often takes preliminary steps to determine whether disciplinary proceedings are required prior to disposition of a related criminal case. Actual prosecution of ethics charges, however, generally does not commence until the criminal prosecution has run its course.

(1971). Many and varied considerations support this well-recognized doctrine. Basic to the rule is the precept that courts of equity should not restrain a criminal prosecution where an adequate remedy at law exists and no irreparable injury would obtain. Within the bounds of the Constitution, limited federal equitable jurisdiction prevents "erosion of the role of the jury and avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the [federal] rights asserted." *Id.* at 44. Vital among the considerations determinative of equitable jurisdiction is the concept of comity, "that is, a proper respect for state functions. . . ."[12] *Id.* at 45. In essence, an accused should be compelled to rely upon his defenses in the state courts, "unless it plainly appears that [this] course would not afford adequate protection." *Fenner* v. *Boykin,* 271 U.S. 240, 244 (1926). See also *Samuels* v. *Mackell,* 401 U.S. 66, 72 (1971). Stated another way, "a pending state proceeding, in all but unusual cases . . . provide[s] the federal plaintiff with the necessary vehicle for vindicating his constitutional rights. . . ." *Steffel* v. *Thompson,* —— U.S.

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[12] The policy against federal interference with state functions is deeply rooted in our history. It bears repeating that our union was established by thirteen uneasy states fearful of national encroachment upon their independence. The national government received an assigned role dependent upon specific constitutional authorization. All else was reserved to the states. As noted in Judge Adams' dissenting opinion, the first formal expression of the *"Younger* spirit in federal law came in 1793, when Congress imposed an absolute ban on federal injunctions issued 'to stay proceedings in any court of a state.'" (A148). See 1 *Stat.* 335, the forebearer of 28 *U.S.C.* §2283. Although suits entertained under the Civil Rights Act form an exception to the proscription contained in the anti-injunction statute (see *Mitchum* v. *Foster,* 407 *U.S.* 225 (1972)), section 2283 represents a long standing public policy against federal interference in state proceedings.

——, 94 S. Ct. 1209, 1216 (1974). Thus, apart from the traditional prerequisite to obtaining an injunction, *i.e.*, irreparable injury, the "fundamental policy against federal interference with state criminal prosecutions requires the additional showing that the irreparable harm be both great and immediate." *Younger* v. *Harris, supra* at 46. "[T]he threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* at 47. In short, there must be an allegation that the state prosecution was undertaken in bad faith or for purposes of harassment, or that "other unusual circumstances" exist which would justify federal interference, and that the constitutional harm sought to be averted is both "great and immediate." *Id.* at 54. See also *Perez* v. *Ledesma,* 401 U.S. 82, 85 (1971).

These well recognized requirements are equally applicable when considering the propriety of issuing declaratory relief where there is a pending prosecution in the state courts. Compare *Steffel* v. *Thompson, supra,* with *Samuels* v. *Mackell, supra.* See also *Great Lakes Dredge and Dock Co.* v. *Huffman,* 319 U.S. 293 (1943). In cases where criminal proceedings are initiated prior to the institution of a federal civil suit, "the propriety of declaratory and injunctive relief should be judged by essentially the same standards." *Samuels* v. *Mackell, supra* at 72. As this Court has aptly observed, "[i]n both situations deeply rooted and long settled principles of equity have narrowly restricted the scope for federal intervention. . . ." *Ibid.* "[A] declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long standing policy limiting injunctions was designed to avoid." *Ibid.* Thus, "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in

determining whether to issue a declaratory judgment." *Id.* at 73. Specifically, it is incumbent on the plaintiff to allege facts amounting to bad faith harassment which has caused or threatens to cause great, immediate and irreparable injury. We submit that the complaint in this case falls far short of satisfying these well-settled criteria.

B. The "Extraordinary Circumstances" Requirement

The single most salient feature of this case is that the prosecution of respondent "grew out of an ongoing State Grand Jury [i]nvestigation into alleged acts of misconduct initiated prior to the incidents" averred in the complaint (A98). It is clear that neither bad faith nor harassment was present in Helfant's prosecution despite respondent's *ipse dixit* assertion to the contrary. "Bad faith" and "harassment" signify that a prosecution is being instituted or threatened with no reasonable hope or expectation of obtaining a valid conviction. *Perez* v. *Ledesma, supra* at 85. Under such circumstances, it is plain that the federal plaintiff's constitutional rights cannot be vindicated in the state criminal trial. *Ibid.*

The factual pattern in *Dombrowski* v. *Pfister,* 380 U.S. 481, 486, 490 (1965), is illustrative of what constitutes a bad faith prosecution. There, the appellants offered to prove that their offices had been raided and all their files and records seized pursuant to search and arrest warrants that were later summarily vacated by a state judge for lack of probable cause. They also offered to prove that despite the state court order quashing the warrants and suppressing the evidence seized, the prosecutor was continuing to threaten the initiation of new prosecutions under the same statutes, was holding public hearings at which photostatic copies of the illegally seized documents were being used, and was threatening to use other copies

of the illegally seized documents to obtain grand jury indictments on charges of violating the same statutes. Quite obviously, federal intervention was necessary to protect appellants from the prosecutor's malicious machinations.

Honey v. *Goodman,* 432 F.2d 333 (6 Cir. 1970), also reveals the broad contours of the "bad faith" exception. There, plaintiffs mailed letters to persons protesting the arrest and trial of several persons. As a result, they were charged with the offense of embracery. Plaintiffs petitioned the federal court to enjoin their prosecution on the grounds that the criminal actions were instituted in bad faith, with no real hope of ultimate success, for the sole purpose of deterring them from the expression of unpopular ideas. The district court dismissed the complaint. On appeal, the Court of Appeals held that the lower court erred in dismissing the suit because if the plaintiffs proved that the prosecution had been instituted without expectation of ultimate success and for the purpose of discouraging the exercise of their rights, they would have revealed the bad faith necessary to secure an injunction against a pending state proceeding. See also *Eames* v. *Pitcher,* 468 F.2d 905 (5 Cir. 1972); *Holmes* v. *Giarusso,* 319 F. Supp. 832 (E.D. La. 1970).

Federal relief against a pending state prosecution was also granted in *Shaw* v. *Garrison,* 467 F.2d 113 (5 Cir. 1972). There, plaintiff had been charged with conspiring to assassinate President Kennedy and had been acquitted. Following his acquittal, the District Attorney secured an indictment charging the plaintiff with committing perjury at his trial. The federal court enjoined the perjury prosecution because it believed that there was a serious question as to whether the conspiracy charge had any basis and it found that the prosecutor had taken extreme measures in extracting information from the State's witnesses, thus raising serious questions as to the validity and objectivity of the State's case. The Court issued the injunction in order to prevent the District Attorney from hounding an innocent person.

A state prosecution was also enjoined in *Krahm* v. *Graham,* 461 F.2d 703 (9 Cir. 1972). There, bookstore owners were charged with violating obscenity statutes. Eleven cases came to trial and none resulted in convictions. As a result, city officials instituted more prosecutions against the store owners. The federal court issued an injunction against the prosecutions because the multiplicity of charges filed against the plaintiffs made it impossible for them to raise their constitutional claims in a single criminal proceeding. See also *Miami Health Studios* v. *City of Miami Beach,* 353 F. Supp. 593 (S.D. Fla. 1973).

The foregoing cases illustrate the kind of conduct by state authorities that would constitute "bad faith" or "harassment" and which would give rise to a right to federal equitable relief during the pendency of a state prosecution. The cases can be divided into two categories: (1) where a prosecutor brings a prosecution with no expectation of securing a conviction, and (2) where state authorities have pursued a course of continuous harassment, characterized by repeated arrests and prosecutions. Proof that a prosecutor has engaged in such conduct merits federal intervention in the state criminal process only because it clearly demonstrates that the prerequisite to federal injunctive relief, *i.e.,* irreparable harm or the inability to remove the threat by defense against a single criminal prosecution, has been met. When a prosecutor procures an indictment against an individual without expectation of securing a conviction, he is not interested in bringing the case to trial. Consequently, if the defendant were not entitled to federal relief, he would be left without a forum in which to assert his constitutional rights.

Similarly, the criminal defendant who is subjected to continuous harassment and repeated prosecutions needs the assistance of the federal courts if his constitutional rights are to be protected because even a successful defense of those rights in the state courts results in further prosecution. Such a defendant cannot eliminate the threat to his constitutional rights defending in a single criminal trial.

Unassailably, nothing in the complaint reveals bad faith in bringing the prosecution in this case. Nor does Helfant's new claim of entrapment, first raised in his cross-petition, support a finding of bad faith. And as we will later note, even assuming that Helfant was "entrapped," there is no reason to presume that the State court system cannot properly adjudicate that issue. So too, respondent's gratuitous allegation that there was "collusion" between the Attorney General and members of the Supreme Court does not provide a triable issue with respect to "bad faith." We will subsequently discuss Helfant's contention in this regard in another section of our brief. Suffice it to say at this point, the Attorney General's alleged disclosure of the grand jury minutes neither violated federal constitutional principles nor contravened State policy regarding the separation of powers doctrine. Clearly, Helfant's constitutional rights can be vindicated in a single prosecution in the State courts.

Notwithstanding the fact that the State prosecution antedated the incidents averred in the complaint, the majority concluded that the New Jersey Supreme Court's disciplinary investigation which immediately preceded respondent's appearance before the grand jury constituted such "extraordinary circumstances" as to compel federal intervention in a pending state criminal prosecution (A144; A147). This case thus presents the novel question

of what constitutes "extraordinary circumstances" within the meaning of *Younger* v. *Harris, supra.* Specifically at issue is whether the "extraordinary circumstances" exception to *Younger's* interdiction was intended to establish a distinct category justifying federal intervention, or whether this Court intended the phrase to be merely descriptive of the traditional standards of "bad faith" or "harassment." In any event, this Court has never delineated the contours of the "extraordinary circumstances" exception. As noted in the dissenting opinion, "scattered statements by the Court seem to indicate doubt on the part of some of the justices that any such exception exists at all" (A162). See, *e.g.,* Mr. Justice Black's opinion in *Perez* v. *Ledesma, supra* at 85. See also Chief Justice Burger's opinion in *Allee* v. *Medrano,* —— U.S. ——, 94 S.Ct. 2191 (1974).

The majority opinion is premised on the view that the "extraordinary circumstances" exception constitutes a distinct category supporting federal intervention in a pending state prosecution. Even assuming the existence of such a category, however, the court erred in finding that this case fell within its purview. If, as the court below stated, the concern was merely with the appearance of impropriety on the part of the New Jersey Supreme Court, such grounds manifestly do not warrant federal intervention. Plainly, the federal question is whether the State courts provide a proper forum for resolution of respondent's claim.[13] In petitioners' view, the "extraordinary

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[13] See, *e.g., Gilliard* v. *Carson,* 348 *F.Supp.* 757 (M.D.Fla. 1972). There, plaintiffs, as representatives of a class consisting of indigent citizens facing prosecution in the municipal court of

(Footnote continued on following page)

circumstances" finding of the majority must be predicated on the claim that the State judicial system could not vindicate respondent's federal constitutional rights. Assuming, as we must, that the New Jersey courts are capable of fairly adjudicating the issues relating to respondent's guilt or innocence, the federal inquiry ends. The mere

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Jacksonville, Florida, asserted that the Court did not provide counsel for persons who faced imprisonment. The Court in *Gilliard* found that the City of Jacksonville had failed and was failing to provide counsel to indigent defendants in its municipal court who were facing incarceration and the only alternative to federal equitable relief was for each indigent citizen to petition for a writ of habeas corpus after he had been confined unlawfully. There being no opportunity for the indigent persons to raise their claims in the local tribunal, the federal court granted relief.

Another case that may have some bearing is *Scott* v. *Miller*, 449 *F.*2d 634 (6 Cir. 1971). There, the plaintiff had been convicted of murder in Kentucky and he appealed his conviction to the Kentucky Court of Appeals, the State's highest court. While the appeal was pending, the criminal defendant asked a federal court to enjoin the Kentucky tribunal from hearing his appeal. The basis of his federal suit was an allegation that a decision by the State Court of Appeals would violate his constitutional rights because the judges on the Court had been elected from malapportioned districts. The district court dismissed the plaintiff's complaint and the Court of Appeals affirmed, holding that *Younger* precluded intervention since the plaintiff could assert his claim before the Kentucky court and, if unsuccessful there, could petition the United States Supreme Court for a Writ of Certiorari. While the Court did not discuss the question, it is interesting that the possible subjectivity of Kentucky's appellate judges and the appearance of impropriety in having judges rule on the validity of their own elections was not considered to be a ground for federal relief, while a state prosecution was pending on appeal.

appearance of impropriety does not present a federal question. Indeed, to hold otherwise is to not merely exalt, but enthrone form over substance because "[i]t is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court. . . ." *Dombrowski* v. *Pfister,* 380 U.S. 479, 484 (1965).

Distilled to its essence, the majority opinion adopted respondent's contention that "the factual involvement of the New Jersey Supreme Court would destroy the objectivity of the entire State court system in processing his constitutional claim" (A136). The majority opinion is thus predicated upon the astounding and unjustified assumption that the entire State judiciary would be nocuously infected by virtue of the Supreme Court's inquiry whether respondent should continue to preside pending resolution of the grand jury investigation. More shocking, however, is the unwarranted conclusion that this inference of pervasive tendentious predisposition exists without any consideration of the motivation of the State Supreme Court in conducting its conference with respondent. Even if respondent's will was overborne and he was thus "coerced into testifying," there can be no assumption of partiality or bias absent a showing of some malevolent intent on the part of the members of the Supreme Court. Succinctly stated, respondent's complaint is barren of any allegation supporting the stultifying assumption entertained by the majority that the State courts do not provide an effective forum for resolution of the constitutional claims asserted here.

Plainly, there was nothing ominous in the Supreme Court's conference with respondent. New Jersey's Con-

stitution[14] and statutory law[15] confer broad administrative responsibility on the Supreme Court to insure public confidence in the bar and the bench. The Chief Justice serves as the "administrative head" of the court system and assigns and transfers members of the judiciary to the various divisions and parts. *Constitution of New Jersey,* Article 6, Section 7, paragraphs 1 and 2. As a matter of state practice, all disciplinary actions are initiated and supervised by the Supreme Court. *Constitution of New Jersey,* Article 6, Section 2, paragraph 3. Moreover, removal or suspension of a member of the judiciary lies in the sole province of the Supreme Court. See, *e.g.*, N.J.S.A 2A:1B-3; N.J.S.A. 2A:1B-7; N.J.S.A. 2A:1B-9. And significantly, "the Constitution [and statutory law] place the administrative control of the municipal court in the Supreme Court and the Chief Justice." See *Kagan* v. *Caroselli,* 30 N.J. 371, 379, 153 A.2d 17, 21 (1959). See also *Constitution of New Jersey,* Article 6, Section 2, paragraph 3. Thus, the Supreme Court "is charged with responsibility for the overall performance of the judicial branch . . ." and this broad grant of authority includes the "power reasonably necessary" to fulfill its constitutional and statutory obligations. *In re Mattera,* 34 N.J. 259, 264, 168 A.2d 38, 45 (1961). See also *State* v. *DeStasio,* 49 N.J. 247, 253, 229 A.2d 636, 639 (1967), *cert.* denied 389 U.S. 830 (1967).

The mere fact that it is incumbent on the New Jersey Supreme Court to initiate disciplinary and removal proceedings does not render its members incapable of subsequently adjudicating the merits of related criminal convictions. Certainly, a judicially disciplined mind is able to remain impartial. *Cf. American Trial Lawyers Ass'n* v. *New Jersey Supreme Court,* 409 U.S. 467 (1973). See also *United States* v. *Grinnell Corp.,* 384 U.S. 582, 583 (1966); *Napolitano* v. *Ward,* 457 F.2d 279, 282 (7 Cir. 1972); *DeVita* v. *Sills,* 422 F.2d 1172 (3 Cir. 1970). Further, it is a slur on the entire State judicial system to presume that a biased judge would not abide by settled New Jersey practice and disqualify himself. R. 1:12-1 and R. 1:12-2.[16] Thus, there is no reason to assume that the entire State judicial system is morally and ethically bankrupt.

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[14] The New Jersey Constitution vests in the Chief Justice the power to temporarily assign Superior Court judges to the Supreme Court. *Constitution of New Jersey, Article 6, Section 2,* paragraph 1. The Supreme Court has jurisdiction "over admission to the practice of law and the discipline of persons admitted." *Constitution of New Jersey, Article 6, Section 2,* paragraph 3. In addition, the Supreme Court makes rules governing practice and procedure and exercises appellate jurisdiction "in the last resort in all causes provided in [the] Constitution." *Constitution of New Jersey, Article 6, Section 2,* paragraphs 2 and 3.

[15] The constitutional authority to discipline, suspend or remove members of the judiciary is supplemented in statutory provisions. The Supreme Court may institute removal proceedings "on its own motion." N.J.S.A. 2A:1B-3. Removal may be based upon "misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence." N.J.S.A. 2A:1B-2. The Attorney General is to prosecute proceedings for removal. N.J.S.A. 2A:1B-5. In all instances, the defending judge has the right to counsel, compulsory process and other constitutional protections guaranteed by the Fourteenth Amendment. See, *e.g.,* N.J.S.A. 2A:1B-6, 7, 8 and 9.

[16] Even if all four present members of the New Jersey Supreme Court who sat at the time of the events averred in the indictment disqualified themselves, depriving the Court of the requisite five justice quorum, the presiding justice (presumably Chief Justice Richard Hughes, who was appointed subsequent to the events alleged in the complaint) is authorized to appoint judges of the Appellate Division of the Superior Court of New Jersey to fill the vacancies. R. 2:13-2.

The Supreme Court's obligation to the bench, the bar and the public, grounded in the State Constitution and statutory law, cannot await formal indictment, trial and conviction. See *DeVita* v. *Sills, supra.* The Court's obligation to preserve the appearance and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. While these inquiries may serve to embarrass and even unnerve individual members of the bar, no malevolent purpose can be imputed.

Here, for example, allegations of abuse of office had been aired, and it was incumbent upon the State Supreme Court to determine whether respondent intended to preside in his official capacity during the pendency of the Attorney General's investigation. As is evident from its inquiry, the Court's concern was focused upon its fear that public respect and confidence in the judicial process would be diminished by virtue of respondent's continued participation as a judge during the pendency of a grand jury inquiry into his own activity. In his complaint respondent alleged no intent on the part of the Supreme Court to affect the grand jury proceedings, or to compel him to testify. Nor does the fact that the conference fortuitously occurred immediately prior to the respondent's scheduled appearance before the grand jury support an inference of any interest on the part of the members of the Supreme Court in the outcome of the Attorney General's criminal investigation.

The majority below recognized the importance of maintaining both the appearance and existence of judicial integrity[17] (A143). The court further alluded to the well

[17] Quoting Lord Herschell, the majority noted "[i]mportant as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it" (A143). See R. Pound, "Mechanical Jurisprudence," 8 *Colum. L. Rev.* 605, 606 (1928).

recognized policy of judicial restraint based upon "the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law . . . ." *Stefanelli* v. *Minard,* 342 U.S. 117, 120 (1951) (A140). Paradoxically, the court concluded that both objectives could best be advanced by federal intervention in a criminal prosecution pending in the State courts. According to the majority, "[s]uch limited use of authorized power will free the New Jersey court system of any suggestion that a fact-finding on the voluntariness issue by a trial judge in this case would be influenced, consciously or unconsciously, by the 'brooding omnipresence' of the New Jersey Supreme Court" (A144).

Despite the majority's assertions to the contrary, the decision below in no way serves the interests of comity. Rather, it connotes a disturbing diffidence in the State judiciary. The majority opinion is predicated upon an assumption that members of the Supreme Court (1) will be predisposed against respondent, (2) that they will not disqualify themselves pursuant to settled New Jersey practice, (3) that they will utilize their broad administrative powers to coerce other State court judges, and (4) that the entire State judiciary will be intimidated by their interest in the outcome of the case. This feckless scenario not only taxes one's credulity, but is so absurd that its mere recitation commands its refutation.

C. The "Great and Immediate" Harm Requirement.

We now turn to the second requirement of *Younger* v. *Harris, supra;* namely that federal interference in a state criminal prosecution may be sanctioned, if at all, only when the alleged unconstitutional injury sought to be averted will be "both great and immediate." *Id.* at 46. See also *Fenner* v. *Boykin, supra* at 243. This recognized

doctrine has its genealogy in traditional precepts of equitable restraint and constitutes a *sine qua non* of federal relief. *Fletcher* v. *Bealey*, 28 Ch. 688 (1885). See also Story, *Equitable Jurisprudence*, 377 (1919). The equitable principle that harm must be imminent before an injunction or other form of relief will issue is an integral part of the doctrine of federal non-intrusion. Fiss, *Injunctions* 2-9 (1972). Principles of comity and federalism dictate that only in the most extraordinary circumstances is a federal court warranted in transcending the imprecise line that separates the jurisdiction of the two coequal judiciaries. It bears repeating that our national Constitution calls for judicial parallelism and not federal hegemony. This is not to denigrate the federal judiciary's responsibility to protect and to safeguard the constitutional rights of our citizens. Plainly, the federal judiciary is supreme and the state judicial system is subordinate in resolving federal constitutional questions. But there is no reason to assume that the state courts have less regard for the Constitution than their federal counterparts. Thus, the drastic measure of federal equitable intervention in an ongoing state criminal prosecution should be afforded only on the most limpid and compelling of grounds. Yet, the majority opinion is grounded solely upon conclusory allegations which fail to state any injury, much less one that is great or immediate. Respondent has not yet suffered any deprivation of his constitutional rights for which a remedy is available only in the federal courts. Indeed, there is no reasonable prospect that he ever will.

That this is so can best be illustrated by examining respondent's factual allegations and reviewing the legal consequences which necessarily follow. We submit that there is no allegation in the complaint of any conduct on the part of the Supreme Court of New Jersey which

could sustain a finding of coercion not to plead the Fifth Amendment. Specifically, the complaint is barren of any allegation that respondent's waiver of his privilege against self-incrimination was the product of governmental misconduct or misbehavior. As such, the complaint fails to set forth any constitutional injury, much less one that is both "great and immediate." But even if there is a triable issue as to coercion, there is no basis to say that a finding in favor of respondent would avail him of anything. If respondent was coerced into testifying, that would in no sense provide him with a license to lie with impunity. Hence, a finding of coercion would not affect trial on those counts in the indictment charging Helfant with false swearing. Further, since respondent's testimony before the grand jury was exculpatory, there is little likelihood that his statements will be used against him at trial. In point of fact, no evidentiary doctrine in New Jersey would support admission of respondent's testimony as substantive evidence. That being the case, any constitutional harm alleged in Helfant's complaint is purely fictive and certainly does not resemble, much less, qualify, as "great and immediate."

In sum, what becomes ineluctably apparent is that the respondent's claims need never be presented during the trial on the State indictment. Assuming the allegations of the complaint are true, Helfant has suffered no harm in the *Younger* sense with respect to the criminal prosecution, and in fact, no harm at all. In short, his claimed Fifth Amendment violation is chimerical and bears no relation to the State prosecution.

1. Justiciability of the Coercion Issue.

The judgment of the Court below requires the district court to determine whether respondent's "testimony before the State Grand Jury, given on November 8, 1972,

was the product of a free and unconstrained will" (A167). Petitioners take it to be evident that the issue is not whether Helfant's "will" not to testify was overcome by official inquiry into his criminal involvement, or the consequences which might lawfully ensue if he chose not to speak. What must be shown, rather, is that Helfant was "coerced" by the New Jersey Supreme Court by virtue of some unlawful act or unconscionable promise. Surely, one who decides to testify before a grand jury or a petit jury, in the hope that he will not be indicted or convicted, cannot say his Fifth Amendment privilege was denied because the State was pursuing him in accordance with the discharge of its duty to enforce the criminal law. Nor can it be said that every judge and every lawyer who chooses to testify can assert that his free will was overcome because the Supreme Court of the State holds the responsibility to remove, suspend or disbar. Nor would the judge's or the lawyer's position be strengthened if he added his belief that the justices of the Supreme Court would privately regret a plea of the Fifth Amendment by an individual so situated. Nor could the claim be given efficacy by a paranoiac fear that the members of the State Supreme Court would surreptitiously or corruptly impose some penalty in violation of their oaths of office.

The essence of a claim that a waiver was involuntary is not that the individual was persuaded by circumstances to conclude that the less onerous course was to speak, but rather that government extorted the waiver by some misbehavior. Clearly, the mere existence of the removal or disciplinary powers cannot be found to constitute "coercion" no matter how overwhelmed a judge or an attorney may say he is because of the existence of the Court's constitutional responsibility. It would be extraordinary indeed to say that such an allegation creates a basis for federal interference with removal or disbarment proceedings.

In his complaint, respondent alleges that he was asked to meet with the Supreme Court. There is nothing inherently wrong in that procedure. As pointed out, it is the constitutional duty of the Supreme Court to administer the judicial system and to protect the public from the misbehavior of judges and attorneys. The Court's duty to preserve the appearance and fact of judicial integrity often calls for immediate inquiry into allegations of judicial impropriety. See *DeVita* v. *Sills, supra.*[18]

It is consonant with that obligation to decide whether the public interest requires the interim suspension of a judge (or a lawyer). In that connection it is not extraordinary to invite the judge's (or the attorney's) view as to whether a suspension would be self-imposed, failing which the Court might, depending upon circumstances, proceed formally to that end. While such inquiries may serve to embarrass and even unsettle individual members of the bar, no malevolent purpose can be imputed. And, although the complaint charges communications between the Supreme Court and the Deputy Attorney General (which we will later discuss in some detail) handling the grand jury investigation, there is nothing invidious or extraordinary in this procedure. Such communications are routine whenever the question of the fitness of a judge (or a lawyer) comes to the attention of the Court. Surely

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[18] In that case, the Court of Appeals for the Third Circuit recognized this obligation and approved the State mechanism for disciplinary matters. Yet, in the case now before this Court, the majority opinion below disavowed this conclusion, implicitly determining the procedure to be unconstitutionally coercive. In the petitioners' view, the decision below has thus raised a constitutional question as to every disciplinary matter which fortuitously involves a criminal investigation or prosecution. The effect of the decision, in sum, is to preclude the State Supreme Court from exercising its constitutional responsibility.

the complaint adds nothing of legal moment when it characterizes such communications as "collusive".[19]

What must be stressed is that we are dealing not with a Fifth Amendment claim in a due process sense, but with a procedure recognized and established through State constitutional and statutory law. That lawful investigatory conduct may possess a "compelling atmosphere" (*cf. Miranda* v. *Arizona*, 384 U.S. 436, 466 (1966)), or create a "Hobson's choice" for an individual, does not necessarily render the procedure violative of due process. *Id.* at 467.

The context of the New Jersey Supreme Court's inquiry here was not facilitation of the criminal investigation but the protection of the judicial system from public ridicule. This fact is critical since the primordial purpose of the Fifth Amendment is to prevent overbearing by governmental agencies. No doubt, the desire to obtain a conviction can lead to overzealous activity and abuses of power. Through the Fifth Amendment, the framers of the Bill of Rights sought to avoid official transgression in the acquisition of confessions. This purpose is made evident by an examination of the history behind the Fifth Amendment. As this Court recently stated:

> "The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. (citations omitted). Certainly anyone who reads accounts of those investigations . . . cannot help but

[19] In New Jersey, the grand jury is an arm of the Superior Court, and responsibility for its administration lies with the judiciary. See *e.g., In re Jeck*, 26 N.J.Super. 514, 98 A.2d 319 (App.Div.1953).

> be sensitive to the framers' desire to protect citizens against such compulsion. As this Court has noted, the privilege against self-incrimination 'was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Michigan* v. *Tucker*, —— U.S. ——, ——, 94 S.Ct. 2357, 2361-62 (1974).

It is thus clear that the Fifth Amendment is meant to protect citizens against the use of unlawfully obtained inculpatory evidence and to protect against governmental overreaching. It is to this latter consideration that this Court has most frequently turned its attention. See *e.g., Michigan* v. *Tucker, supra; Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Reck* v. *Pate*, 367 U.S. 433 (1961); *Rochin* v. *California*, 342 U.S. 165 (1952); *United States* v. *Carignan*, 342 U. S. 36 (1951).[20]

[20] The original common law rationale for the exclusion of involuntary confessions was that they were inherently untrustworthy. Thus, the voluntariness concept was strictly a principle of common law evidence based on the premise of exclusion of probably, or perhaps only possibly, untrue inculpatory statements which, by reason of their dramatic nature, are likely to have a decisive effect on the trier of facts. The underlying psychological basis of this rationale has been questioned for there is doubt whether there is a substantial danger of false confessions when coercion has been exerted. Professor McCormick, perhaps the leading proponent of this contention, arrives at this conclusion employing reasoning as follows:

> "If we revert, however, to our first inquiry as to whether the danger of false confessions is substantial enough, beyond the danger of untruth in out of court statements generally,

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Accordingly, not every "compelling" influence resulting in an individual's decision to testify violates the Fifth Amendment privilege. Numerous pressures necessarily

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> to warrant the special rules restricting the admissibility of confessions the answer certainly cannot be a confident 'yes'. It may well be doubted whether confessions of guilt, even where they are extorted by pressure of force or fear, are not reasonably trustworthy . . . Accordingly, it seems clear that while the policy on which all rules of competency are founded, the policy of safeguarding the trustworthiness of evidence admitted, has had an ancillary role in shaping the rules restricting the admission of confessions, the predominant motive of the courts has been that of protecting the citizen against the violation of his privilege of immunity from bodily manhandling by the police and from other undue pressures described [as] the third degree." McCormick, *Evidence*, §109, p. 229 (1954).

For further authority supporting this thesis see McCormick, *"The Scope of Privilege in the Law of Evidence,"* 16 *Texas L. Rev.* 447, 451, 457 (1938); McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 *Texas L. Rev.* 239, 245 (1946); Allen, "Due Process and State Criminal Procedures: Another Look," 43 N.W.U.L. Rev. 16, 19 (1953); Maguire, *Evidence of Guilt*, 109 (1959); Note, 63 *Michigan L. Rev.* 381 (1964); Note, 31 *U. Chi. L. Rev.* 313, 320 (1964).

In 1936, the voluntariness doctrine was raised to constitutional rank in the landmark case of *Brown* v. *Mississippi*, 297 U.S. 278 (1936), which held that it was a clear denial of due process guaranteed by the Fourteenth Amendment to admit into evidence a defendant's confession which had been tortured from him by state officials. The *Brown* Court reasoned that "state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which be at the base of all our civil and political institutions." *Id.* at 286. See also *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964). See cases collected in 3

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come to bear on an individual whose activities are the subject of governmental investigation. The very fact of the investigation, or the apparent proofs adduced, may influ-

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Wigmore *Evidence*, §820(D), p. 306, fn. 1 (*Chadbourne Rev.* 1970). The rationale of this constitutional doctrine does not relate to the trustworthiness or reliability of the statement as evidence. "[T]he reliability of a confession has nothing to do with its voluntariness—proof that a defendant committed the act with which he is charged and to which he has confessed is not to be considered when deciding whether a defendant's will has been overborne." *Jackson* v. *Denno*, 378 U.S. 368, 385 (1964).

In 1944 this Court decided *Ashcroft* v. *Tennessee*, 322 U.S. 143 (1944) and in every confession case since then (with one exception) the deterrence rationale has been the primary component in the Court's "complex of values" test. The exception was *Stein* v. *New York*, 346 U.S. 156 (1953) wherein this Court reverted to the trustworthiness rationale. "[R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence." *Id.* at 192. This approach to the problem, however, proved to be short lived as a constitutional principle and its ultimate demise was foreshadowed eight years later when this Court decided *Rogers* v. *Richmond*, 365 U.S. 534 (1961). Mr. Justice Frankfurter, writing for the Court, spoke directly to the trustworthiness and deterrence concepts:

> "[C]onvictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial system and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not

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ence an individual to alter an intention to remain silent. So too, that formal criminal charges may be imminent

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> by coercion prove its charge against an accused out of his own mouth [citations]. To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed." *Id.* at 540-541.

When this Court decided *Jackson* v. *Denno* three years later it rejected the premise that "the exclusion of involuntary confessions is constitutionally required solely because of the inherent untrustworthiness of a coerced confession" and expressly overruled *Stein*. *Id.* at 383 and 391. In *Jackson* it was again made clear that the constitutional concept of voluntariness was rooted in the deterrence theory expounded in *Rogers,* and the concept was further explained later in the following words:

> "It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because 'of the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' [citing *Blackburn* v. *Alabama,* 361 U.S. 199, 206 (1960)] and because of 'the deeprooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano* v. *New York,* 360 U.S. 315, 320-321 (1959); *Jackson* v. *Denno, supra* at 385-386.

may well "compel" the "accused" to lay bare the details of his defense or to offer an explanation for his conduct. Suffice it to say, the resulting "compulsion" may spring from a panoply of sources, including social, professional and familial pressures. The federal Constitution is not offended by the revelation of criminal conduct under such circumstances, or by a judgment that continued silence is not in the accused's best interest.

Necessarily, the issue "must be resolved in terms of balancing the public need on one hand, and the individual claims to constitutional protection on the other." See plurality opinion by Mr. Chief Justice Burger in *California* v. *Byers,* 402 U.S. 424, 427 (1971). As aptly stated by Mr. Justice Harlan, "If the individual's ability in any particular case to perceive a genuine risk of self-incrimination is to be a sufficient condition for imposition of use restrictions on the government in all self-reporting contexts, then the privilege threatens the capacity of the government to respond to societal needs with a realistic mixture of criminal sanctions and other regulatory devices." *Id.* at 453. And as noted by a majority of this Court in *Harrison* v. *United States,* 392 U.S. 219, 222 (1968), "[a] defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him."

So too, in *Williams* v. *Florida,* 399 U. S. 78, 83-84 (1970), this Court said:

> "The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their iden-

tity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments."

Similarly, in *McGautha* v. *California,* 402 U.S. 183, 213 (1971), against the backdrop of a contention that a unitary trial penalized a defendant who wanted to testify as to punishment but not as to the issue of guilt, this Court said:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments as to which course to follow. *McMann* v. *Richardson,* 397 U.S. (759) at 769, 90 S.Ct. (1441), at 1448, 25 L.Ed. 2d (763) at 772. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the

policies behind the rights involved. Analysis of this case in such terms leads to the conclusion that petitioner has failed to make out his claim of a constitutional violation in requiring him to undergo a unitary trial.

• • •

"It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. . . . It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. . . . Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify.

Further, a defendant whose motion for acquittal at the close of the Government's case is denied must decide whether to stand on his motion or put on a defense with the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty."

See discussion of these cases in *State* v. *Falco,* 60 N.J. 570, 292 A.2d 23 (1972).[21]

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[21] Distinguishable are such decisions as *Leary* v. *United States,* 395 U.S. 6 (1969); *Marchetti* v. *United States,* 390 U.S. 39

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Consequently, there is no triable issue of coercion presented in this case. Helfant disavowed, under oath, any claim that any member of the Court directed him to waive the Fifth Amendment or made any threat in that regard. What remains, at most, is a baseless fear that the justices would somehow be faithless to their constitutional duty, an apprehension unsupported by any allegation of impropriety. When the complaint is carefully scrutinized, no more emerges than that the New Jersey Supreme Court was acting in the good faith exercise of its constitutional responsibility. We submit on the basis of respondent's complaint, the issue of "coercion," *i.e.*, improper pressure on Helfant, is not raised. Surely if some vestige of such a conclusory assertion is thought to be inferable, the supporting allegations are too exigous to warrant federal intervention in a pending state prosecution by either the extraordinary remedy of injunction or declaratory relief. See *e.g., Robinson* v. *McCorkle*, 462 F.2d 111, 114 (3 Cir. 1972), *cert.* denied 499 U.S. 1042 (1972); *Coopersmith* v. *Supreme Court*, 465 F. 2d 993, 994 (10 Cir. 1972).

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(1968); *Grosse* v. *United States*, 390 U.S. 62 (1968); *Haynes* v. *United States*, 390 U.S. 85 (1968), and *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965). The holdings in all of these cases were based on the fact that the laws in question were directed at a class of persons who were suspected of criminal activity and whose compliance with the requisite statutes would immediately expose them to prosecution. The State's disciplinary procedures at issue here are not directed to those suspected of criminal activity and certainly are not designed to compel them to incriminate themselves.

2. Effect of Coercion on the False Swearing Counts.

The authorities overwhelmingly hold that the Fifth Amendment does not authorize perjury or false swearing, and hence it is no defense that a waiver of the Fifth Amendment privilege was coerced. These authorities will be discussed at length, *infra*. We are at a loss, however, to understand the majority's handling of this issue. The dissenting opinion expressly agreed with our position. The majority opinion nevertheless was silent with respect to this issue. We think it is incomprehensible that the majority would silently decide this point against the State for two reasons. First, the majority could hardly ignore the wealth of authority laid before it. If it meant to disagree, it would surely have said so and explained why. Second, since the dissenting opinion spoke directly to the issue, and at some length, the majority would be expected to address the question. More importantly, there is no discernible basis for interfering in any way with the trial of the false swearing counts. As we noted above, upon receiving the opinion, we sought to elicit the majority's position by moving to vacate the stay as to the trial of the false swearing counts. Our motion was denied without explanation. We submit that there is no reason for a stay of Helfant's trial on these counts.

Even assuming that the Supreme Court's conference with respondent had the effect of coercing him into testifying, and that the State courts could somehow be considered incapable of adjudicating issues pertaining to this alleged "misconduct," the Court of Appeals was nevertheless in error in intervening in the pending prosecution for false swearing. Since the question of coercion is, as a matter of law, irrelevant to the issues to be considered at trial, it is equally apparent that such a claim could not affect or infect the "aura" of the State criminal proceed-

ings. Conceding for the purpose of argument the wholesale contamination of New Jerseys' judiciary, respondent has suffered no direct injury which would support federal equitable relief. That is true because the issue of coercion need never be presented to the State judiciary.

In determining the impact of a coercion defense on an indictment charging false swearing it is relevant to examine the scope of the Fifth Amendment privilege. That Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." It is well settled that perjury cannot be self-incriminatory, since the scope of the Fifth Amendment privilege extends only to past criminal conduct. "[I]t does not . . . reach forward to protect against incrimination for future acts." *In re Baldinger,* 356 F. Supp. 153, 162 (C.D. Cal. 1973).[22] In no sense is Fifth Amendment protection extended to perjured testimony. The privilege "does not endow the person who testifies with with a license to commit perjury.[23] *Glickstein* v. *United States,* 222 U.S. 139,

[22] New Jersey law is in accord. See *State* v. *Falco,* 60 N.J. 570, 292 A.2d 23 (1972); *State* v. *Williams,* 59 N.J. 493, 284 A. 2d 272 (1971).

[23] Other courts, both state and federal, have held that untruthful testimony is not protected by the Fifth Amendment privilege. See *United States* v. *Irali,* 503 F.2d. 1295, 1302 (7 Cir. 1974); *United States* v. *Nickels,* 502 F.2d 1173, 1176 (7 Cir. 1974); *United States* v. *Tramunti,* 500 F.2d 1334, 1342-43 (2 Cir. 1974); *United States* v. *Devitt,* 499 F. 2d 135, 142 (7 Cir. 1974); *United States* v. *Hockenberry,* 474 F. 2d 247 (3 Cir. 1973); *United States ex rel. Annunziato* v. *Deegan,* 440 F.2d 304 (2 Cir. 1971); *Robinson* v. *United States,* 401 F.2d. 248, 251 (9 Cir. 1968); *United States* v. *Orta,* 253 F.2d 312, 314 (5 Cir. 1958), *cert.* denied 357 U.S. 905 (1958); *Claiborne* v. *United States,* 77 F.2d

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141 (1911). See also *United States* v. *Knox,* 396 U.S. 77, 82 (1969); *United States* v. *Kahriger,* 345 U.S. 22, 32 (1952). Thus, in *Bryson* v. *United States,* 396 U.S. 64, 72 (1969), this Court characterized as unthinkable the "principle . . . [that] a citizen has a privilege to answer fraudulently a question that the government should not have

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682, 690 (8 Cir. 1935); *United States* v. *Provinzano,* 326 F.Supp. 1066, 1067 (E.D.Wis. 1971); *United States* v. *Ponti,* 257 F.Supp. 925 (E.D.Pa. 1966); *Moyer* v. *Brownell,* 137 F.Supp. 594, 605 (E.D.Pa. 1956); *United States* v. *Haas,* 126 F.Supp. 817 (E.D. N.Y. 1954); *United States* v. *Miller,* 80 F.Supp. 979 (E.D.Pa. 1948); *People* v. *Tomasello,* 21 N.Y.2d 143, 234 N.E.2d 190, 192-93 (Ct.App. 1967); *Cf. United States* v. *Wilcox,* 450 F.2d 1131, 1141 (5 Cir. 1971), *cert.* denied 405 U.S. 924 (1971); *Kronick* v. *United States,* 343 F.2d 436, 441 (9 Cir. 1965); *United States* v. *Parker,* 244 F.2d 682, 690 (7 Cir. 1957), *cert.* denied 355 U.S. 836 (1959); *United States* v. *Cason,* 39 F.Supp. 731, 734 (W.D.La. 1941); *Cf. United States* v. *Di Michele,* 375 F.2d 959, 960 (3 Cir. 1967). *Contra: People* v. *Allen,* 15 Mich. App. 387, 166 N.W.2d. 664 (Ct. of App. 1968). In *Allen,* police officers were subpoened to testify before a judge who was conducting an investigation into police corruption. Defendants were advised of their constitutional right to remain silent but testified nevertheless. Subsequently, they were charged with perjury based upon their grand jury testimony. It was asserted that defendants believed that invoking their privilege would have led to suspension from the police department. The court held that "a statement given as a result of a coerced waiver of Fifth Amendment rights can [not] be the basis for a perjury prosecution" 166 N.W.2d at 669. However, the court clearly misconstrued the Fifth Amendment protection afforded a defendant who utters a false statement, exculpatory on its face, before a grand jury. See discussion, *infra.* It is clear that the Fifth Amendment privilege pertains to past acts. Its inapplicability to perjury is equally clear. The court in *Allen* misconceived the function of the exclusionary rule, in disregarding the fact that defendants had been charged with perjury.

asked." There, it was noted that our "legal system provides methods for challenging the government's right to ask questions" and that "lying is not one of them." *Ibid.* In *Kay* v. *United States,* 303 U.S. 1, 6 (1938), this Court noted that "when one undertakes to cheat the government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the government in which the effort to cheat or mislead is made are without constitutional sanction." And in *Dennis* v. *United States,* 384 U.S. 855, 867 (1966), this Court reiterated that basic principle, stating:

> When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, *he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction . . . Analogous are those cases in which prosecutions for perjury have been permitted despite the fact* that the trial at which the false testimony was elicited was upon an indictment stating no federal offense; (*United States* v. *Williams,* 341 U.S. 58, 65-69, 71 S.Ct. 595, 599-601, 95 L.Ed. 747); *that the testimony was before a grand jury alleged to have been tainted by governmental misconduct* (*United States* v. *Remington,* 208 F.2d 467, 569 (C.A. 2d Cir. 1953), *cert.* denied, 347 U.S. 913, 74 S. Ct. 476, 98 L.Ed. 747 (1969); or that the defendant testified without having been advised of his constitutional rights (*United States* v. *Winter,* 348 F.2d 204, 208-210 (C.A. 2d Cir. 1965), *cert.* denied, 382 U.S. 955, 86 S.Ct. 429, 15 L.Ed. 2d 360, and cases cited herein). 384 U.S. at 866 . . . The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. (emphasis added) 384 U.S. at 867.

See also *United States* v. *Pacente,* 503 F.2d 543, 549 (7 Cir. *en banc* 1974); *United States* v. *Nickels,* 502 F.2d 1173, 1176 (7 Cir. 1974); and *United States* v. *Devitt,* 499 F.2d 135, 141-42 (4 Cir. 1974); *Cf. Acanfora* v. *Montgomery City Board of Education,* 491 F.2d 498 (4 Cir. 1974) *cert.* denied —— U.S. ——, 95 S. Ct. 64 (1974).

This well settled rule of law is deeply rooted in reason and applies with equal force in this case. Even assuming that respondent's will was overborne, the compulsion emanating from his conference with the Supreme Court was to testify truthfully not falsely. Any other conclusion would reduce the witness' oath to a meaningless shibboleth. Moreover, assuming that respondent's waiver of his Fifth Amendment privilege was the product of his fear of removal from office or disbarment, that would not permit him to violate his oath and lie with impunity.

This Court has held that statements obtained during the course of disciplinary investigations under threat of dismissal from office cannot be used as evidence in a subsequent criminal prosecution. In *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), for example, this Court reversed the convictions of six New Jersey police officers who had testified before a grand jury after being advised of the then existing statute providing for job forfeiture upon refusal to testify. At trial, their grand jury testimony, which was highly inculpatory, was admitted against them as declarations against penal interest. In reversing, this Court concluded that dismissal from public employment under those circumstances exacted an unwarranted price for exercising the privilege. See also *Lefkowitz* v. *Turley,* 414 U.S. 70 (1973); *Gardner* v. *Broderick,* 392 U.S. 273 (1968); *Uniformed Sanitation Men* v. *Sanitation Comm'r,* 392 U.S. 280 (1968); *Spevack* v. *Klein,* 385 U.S. 511 (1967).

Significantly, defendants in *Garrity* did not testify falsely before the grand jury. On the contrary, they testified truthfully, thereby incriminating themselves as to past criminal misdeeds. Thus, this Court's holding in *Garrity* is in no way applicable to the facts here. Perhaps the most thorough analysis of the *Garrity* rationale as it affects the use of compelled but untruthful testimony can be found in *People* v. *Goldman,* 21 N.Y.2d 152, 287 N.Y.S. 2d 7, 234 N.E. 2d 194 (1967), appeal dismissed for want of a substantial federal question, 392 U.S. 643 (1968), rehearing denied 393 U.S. 899 (1968). There, defendant, a police officer, was charged with perjury after he executed a limited waiver of immunity and testified before a grand jury. It was urged on appeal that the waiver was void because "it was extracted on pain of losing his job." 234 N.E. 2d at 195. The argument was also advanced, using *Garrity* as authority, that since the waiver was the product of coercion, the false grand jury testimony could not form the basis of a perjury indictment. Judge Breitel, writing for a unanimous court, initially reasoned that the scope of the Fifth Amendment protection does not immunize "one . . . from prosecution . . . for perjurious or contumacious testimony." *Id.* at 197. Then, applying the rationale of *Glickstein* v. *United States, supra,* the court analogized the situation to one in which a witness is granted immunity; although the testimony is unquestionably coerced, no insulation is afforded from prosecution, conviction or punishment for perjury. It thus concluded that Fifth Amendment protection does not extend to or license untruthful statements. The holding of *Goldman* is plain. Despite the "coerced" waiver of immunity and subsequent testimony, the witness "is not immune from penalties for crimes inherent in the giving of the testimony itself." *Id.* at 198. It is noteworthy, too, that this Court subsequently dismissed Goldman's appeal for lack of a substantial federal question.

Similarly, in *People* v. *Ricker,* 45 Ill. 2d 562, 262 N.E. 2d 456 (1970), defendant was convicted of perjury. There, it was alleged that he had made contradictory statements before two grand juries. *Ricker* asserted that he had been threatened by his superiors with loss of his position as an attorney with the Metropolitan Sanitary District of Greater Chicago. As a public official, he could have been dismissed for refusing to waive his privilege against self-incrimination before the grand jury. The court recognized the mandate of *Garrity* that "[i]f he testified because he would otherwise have forfeited his public position, his testimony could not be used in a prosecution for a past crime." 262 N.E. 2d at 460. However, the court held:

> ". . . [W]hether the defendant was warned of his constitutional privilege, whether he properly signed his immunity waiver, or whether he could have been compelled to testify is beside the point. *He did testify, he testified falsely and he can be convicted of perjury.*" (emphasis added) 262 N.E. 2d at 461.

The Court in *Ricker* concluded that neither the Fifth Amendment nor *Garrity* was applicable since defendant had testified falsely before the grand jury. All conduct on the part of the Government, including the allegation of coercion, was disregarded. See also *People* v. *Genser,* 250 Cal. App.2d 351, 58 *Cal. Rptr.* 290 (1967).

Petitioners urge a similar treatment of the issue raised here. An individual who is compelled to appear and to testify before a grand jury is protected to the extent that his truthful testimony may not be used in a criminal proceeding against him. However, Helfant's perjurious misconduct before the grand jury must bar him in the instant case, from asserting that alleged governmental im-

propriety "coerced" him to so testify. When respondent appeared before the grand jury he had not yet committed the crime for which he is now indicted. His ". . . criminal liability concurred with the words he first uttered to the . . . Grand Jury." *United States* v. *Parker,* 244 F.2d 943, 947 (7 Cir. 1957). Further, the four counts which charge false swearing were not "based upon evidence of past acts obtained from the mouth of the [respondent] in violation of Fifth Amendment rights. Instead, [they were] based on a crime whose very commission, rather than evidence of commission was the [respondent's] testimony." *United States* v. *Ponti,* 257 F.Supp. 925, 926 (E.D.Pa. 1966). When a witness chooses to testify untruthfully, he is simply not protected by the Fifth Amendment from a resulting prosecution. *United States* v. *Miller, supra.* See also *United States* v. *Daniels,* 461 F.2d 1076, 1077 (5 Cir. 1972); *United States* v. *Manfredonia,* 414 F.2d 760, 765, fn. 3 (2 Cir. 1969); *United States* v. *Remington,* 208 F.2d 567, 569 (2 Cir. 1953), *cert.* denied 347 U.S. 913 (1953); *United States* v. *Parker,* 244 F.2d 682, 690 (7 Cir. 1957), *cert.* denied 355 U.S. 836 (1959); *United States* v. *Winter,* 348 F.2d 204, 208-209 (2 Cir. 1965), *cert.* den. 382 U.S. 955 (1965).[24] Thus, as the dissent properly points out, Helfant's testimony is admissible in evidence even assuming that it was coerced (A156).[25] Although the allegedly coerced testimony may not be used to establish respondent's commission of the substantive offenses, the State may use it to prove that he swore falsely.

[24] As Wigmore wrote:

> If argument were needed, it would be sufficient merely to appeal to the terms of the privilege, which forbids that one be compelled to give evidence against himself for the perjured utterance is not 'evidence' or 'testimony' to a crime but is the very act of crime itself; the compulsion is not to testify falsely but to testify truly; and the privilege by hypothesis would have been violated only if the witness had truely given self-incriminating evidence, but if he falsely exonerates himself, he has confessed no fact 'against himself' hence his privilege has not been infringed by the actual answer even though it might have been by some other answer. *VIII Wigmore, Evidence* §2282, p. 512 (McNaughton Rev. ed. 1961).

3. The Effect of Coercion on the Substantive Offenses.

What has been said thus far relating to the nature of respondent's claimed "constitutional" deprivation applies with equal force with respect to the hypothetical injury which would result from trial on the pending substantive charges. Assuming that respondent was coerced into testifying, that standing alone is insufficient justification to bar prosecution. In short, respondent's complaint nowhere alleges that Helfant gave testimony which is incriminatory. The State has stipulated that it deemed his testimony to be exculpatory, and therefore did not intend to use those statements, except perhaps on cross-examination of respondent if he should depart from them. And there is no allegation that Helfant intends to depart from his grand jury testimony. The dissenting judges below accordingly deemed the "coercion" issue wholly "conjectural," and unworthy of federal interference with the State's criminal process. We think the issue non-existent in the absence of an allegation of incrimination or some other prejudice in the defense to the criminal charges.

[25] This argument was vigorously advanced by petitioner below. Nevertheless, the majority opinion is devoid of any reference to it. Following the rendition of the Court's judgment issued in lieu of a formal mandate, petitioner moved for a recall of the Court's order and for clarification. Specifically, petitioners asked the Court to clarify whether a finding of coercion would preclude prosecution of the false swearing charges. The Court denied petitioners' application without any explanation.

It is beyond cavil that reception by a grand jury of inadmissible or even illegally obtained evidence procured in violation of an individual's constitutional rights does not serve to vitiate the resulting indictment. See, *e.g. United States* v. *Calandra,* —— U.S. ——, 94 S.Ct. 613 (1974); *United States* v. *Blue,* 384 U.S. 251 (1966); *Lawn* v. *United States,* 355 U.S. 399 (1958); *Costello* v. *United States,* 350 U.S. 359 (1966); *Holt* v. *United States,* 218 U.S. 24 (1910). *Gelbard* v. *United States,* 408 U.S. 41 (1972) is not to the contrary. In *Gelbard,* this Court was presented with the narrow question of whether a witness before a grand jury who was cited for civil contempt for refusal to answer questions she believed were based on illegal wiretap evidence, has standing under 18 U.S.C. §2515 to suppress the evidence. The decision according defendant standing was based exclusively on federal statutory grounds. Thus, the sole relevance of *Gelbard* to the instant matter is its reaffirmance of the long standing rule that:

> "A defendant is not entitled to have his indictment dismissed before trial simply because the government acquired incriminating evidence in violation of the law, even if the tainted evidence was presented to the jury." *Id.* at 60.

One line of cases has indicated that where a target of an investigation is compelled to give incriminating evidence before a grand jury, that same grand jury cannot permissibly indict for the offenses to which he has confessed. See *e.g. Goldberg* v. *United States,* 472 F.2d 513, 516 (2 Cir. 1973); *Jones* v. *United States,* 342 F.2d 863 (D.C. Cir. 1964); *United States* v. *Tane,* 329 F.2d 848 (2 Cir. 1964); *United States* v. *Lawn,* 115 F.Supp. 674 (S.D.

N.Y. 1953), appeal dismissed *sub nom, United States* v. *Roth,* 208 F.2d 467 (2 Cir. 1953). For example, the court in *Goldberg* v. *United States, supra,* observed that an indictment might be invalid if returned by the same grand jury before whom a defendant was compelled to testify against himself under a grant of immunity, and who actually testified as to incriminating matters. The court applied the rationale of *Bruton* v. *United States,* 391 U.S. 123 (1968), to the grand jury setting in finding that under such circumstances "it would be well nigh impossible for the grand jurors to put [defendant's] answers out of their minds." Thus, the very testimony which was compelled by the grant of immunity might be used against him by the grand jury. *Goldberg* v. *United States, supra* at 516.

It is submitted that this Court's decision in *United States* v. *Calandra, supra,* laid this debate to rest. But assuming that *Calandra* is not dispositive, the indictment in this case would not be subject to attack. It is settled that a mere appearance before a grand jury, albeit compelled, will not vitiate an indictment even if the witness asserts his privilege against self-incrimination. See *United States* v. *Wolfson,* 405 F.2d 779, 784-785 (2 Cir. 1968), *cert.* den. 394 U.S. 946 (1969); *United States* v. *Winter, supra; United States* v. *Addonizio,* 313 F.Supp. 486, 495 (D.N.J. 1970); *United States* v. *DeSapio,* 299 F. Supp. 436, 440 (S.D. N.Y. 1969). Clearly then, a witness must incriminate himself (absent a valid waiver) before the same grand jury which indicts him to give rise to the claim that the indictment so obtained is based on coerced testimony. Indeed, if the utterances are exculpatory, Fifth Amendment protection does not attach.

In his testimony before the grand jury, respondent vigorously denied all the facts material to the allegations against him. His testimony was entirely exculpatory and

thus could not rationally have provided the basis for the indictment; nor indeed could it have served to corroborate the other, independent evidence already before the grand jury. Thus, no "*Bruton*-type" problem could arise in this case. Compare *Goldberg* v. *United States*, *supra*. It is undoubtedly the other evidence—specifically the earlier testimony of two unindicted co-conspirators—upon which the Grand Jury relied in returning the first three counts of the indictment. This evidence, clearly competent and legally admissible, amply insulates the indictment against constitutional challenge. See *Costello* v. *United States*, *supra*. Respondent has thus suffered no prejudice by virtue of his "coerced testimony" before the grand jury. Therefore, the indictment must stand even if the rationale of the *Jones* and *Goldberg* line of cases is applied.

When a witness has been wrongfully deprived of his privilege against self-incrimination, he can be returned to the *status quo ante* merely by the suppression of the coereed testimony and its derivative use. *Kastigar* v. *United States*, 406 U.S. 441 (1972); *Zicarelli* v. *New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972); *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964); *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). It is equally clear that the "use" which is prohibited is the introduction of the "tainted" evidence at trial and not before a grand jury.[26] *United States* v. *Calandra*, *supra*. See also *United States* v. *Addonizio*, 313 F. Supp. 486, 494 (D. N.J. 1970). Thus, the

[26] New Jersey law is in accord. An indictment will not be vitiated merely because incompetent evidence was presented to the grand jury. See, *e.g.*, *State* v. *Ferrante*, 111 N.J. Super. 99, 268 A.2d. 301 (App.Div. 1970); *State* v. *Garrison*, 130 N.J.L. 350, 33 A.2d. 113 (Sup. Ct. 1943); *State* v. *Donovan*, 129 N.J.L. 478, 30 A.2d. 421 (Sup. Ct. 1943); *State* v. *Ellenstein*, 121 N.J.L. 304, 22 A.2d. 454 (Sup. Ct. 1938).

majority was correct when it determined that there was no basis in law for an outright injunction against prosecution, for an injunction under these circumstances would have been tantamount to a dismissal of the indictment.

However, the Court of Appeals improperly concluded that a finding of coercion by the district court would support a declaratory judgment to the effect that the allegedly tainted evidence may not be introduced at respondent's trial. As noted in the dissenting opinion, "the edict thus fashioned by the majority is bottomed on what is, at best, mere speculation that the State will in fact attempt to introduce against Helfant the testimony elicited from him at the grand jury hearing" (A155). This is an eventuality which has not yet arisen and indeed will in all probability never come to pass.

Accordingly, adjudication of this issue by the federal court is plainly premature and in advance of constitutional necessity. There is no indication that the Attorney General intends to utilize respondent's testimony in any way. As previously noted, at oral argument before the Court of Appeals, counsel for the State represented that Helfant's grand jury testimony will be used, if at all, only to impeach any inconsistent statement respondent might utter should he take the witness stand.[27] It becomes ap-

[27] At oral argument, counsel for New Jersey stated "[a]t this time there is no present intention of using that testimony. But were the [respondent] to take the stand, were his testimony to deviate in strong terms, that, testimony then, of course, under *Harris* v. *New York*, [401 U.S. 222 (1970)] might well be" [admissible to impeach his credibility.] That concession was not prompted by an excess of altruism on the part of the Attorney General. It would surely be poor trial strategy for the prosecu-

(Footnote continued on following page)

parent that the constitutional injury sought to be averted by the majority is thus, at best, speculative, depending for its very existence upon a hypothetical series of events which probably will never occur.

A deeply embedded principle of our jurisprudence precludes the resolution of abstract disputes in advance of constitutional necessity, hence the constitutional requirement of a case or controversy. *United States Constitution*, Article III, Section 2; *Flast* v. *Cohen*, 392 U.S. 83, 95-98 (1966); *United States* v. *Freuhauf*, 365 U.S. 146, 157 (1961); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1944); *Muskrat* v. *United States*, 219 U.S. 346, 348 (1911); C. Wright, *Federal Courts* 34 (2d ed. 1963). Embodied in the phrase "case or controversy" is a limitation on the business of the federal courts which confines their authority to deciding "questions presented in an adversary context and in a form capable of resolution through the judicial process." *Flast* v. *Cohen, supra* at 95. Whether grounded in constitutional principle, see, *e.g., Commonwealth of Massachusetts* v. *Mellon*, 262 U.S. 447 (1923); *Fairchild* v. *Hughes*, 258 U.S. 126 (1922),

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(Footnote continued from preceding page)

tion to seek to introduce respondent's exculpatory statements as substantive evidence. Indeed, Helfant's grand jury testimony would not qualify as a declaration against penal interest. Therefore, it would not be admissible under Rule 63 (10) of the *New Jersey Rules of Evidence*. So too, there is no authority which would support the admission of "compelled" statements to contradict a witness' trial testimony: *Cf. Harris* v. *New York, supra*. Nor would respondent's assertion of the defense of duress require the State courts to resolve the coercion issue. In New Jersey, the defense of duress would not be recognized under the facts here. *State* v. *Falco, supra; State* v. *Palmieri*, 93 N.J.L. 195, 199-200, 107 A. 407 (E. & A. 1919); Note, 102 *Harv. L. Rev.* 1071-72 (1954).

or viewed as a mere policy limitation, see *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936), federal courts have long avoided passing prematurely on constitutional questions. Judicial authority may be invoked only when the interests of litigants require protection against actual and immediate interference. A hypothetical threat is not enough. Thus, the related doctrines of "standing," "ripeness," and "mootness" which have evolved over the years are incidents of the primary concept that "federal judicial power is to be exercised . . . only at the instance of one who is himself immediately harmed, [or] immediately threatened with harm, by the challenged action." *Poe* v. *Ullman*, 367 U.S. 497, 504 (1961). See also *O'Shea* v. *Littleton*, —— U.S. ——, 94 S. Ct. 669, 674 (1974); *Allee et al.* v. *Medrano, supra; Boyle* v. *Landry*, 401 U.S. 77 (1971). The same rule obtains whether the litigation concerns a challenge to the validity of a statute or the claimed denial of a constitutional right. *Cf. Cleary* v. *Bolger*, 371 U.S. 392, 402 (1963) (Goldberg, J., concurring).

These principles take on added significance when the federal courts are asked to interfere with a pending state prosecution. *Younger* v. *Harris, supra*. Mere allegations of unconstitutionality will ordinarily not suffice to justify intrusion into a state criminal trial. As previously noted, a crucial aspect of *Younger's* limitation upon incursions into state proceedings is the necessity of a showing of "great and immediate" constitutional injury. *Id.* at 46. Absent this principle, "[e]very question of procedural due process of law—with its far flung and undefined range—would invite a flanking movement against the system of state courts by the federal forum . . . to determine the issue." *Stefanelli* v. *Minard, supra* at 117, 123-24 (1951). Further, this danger has become far more acute as our Constitution has been interpreted to em-

brace rights not previously thought to fall within its protection.

The majority's disregard of the "great and immediate" harm limitation thus emerges in sharp focus. More than a year and-a-half has passed since the grand jury returned the indictment charging respondent with crimes that allegedly occurred in 1968. During this time, New Jersey has been thwarted from proceeding with the prosecution. Significantly, one critical witness has died and other witness' memories have presumably dimmed. To the public, this delay must appear unseemly. Surely respect for the law is thereby diminished.

Nor is there any likelihood that this saga will come to an end in the near future. The court below has ordered a federal trial in the midst of state criminal proceedings in which respondent's challenge to the admissibility of evidence is to be resolved. This lengthy disruption seems unsupportable since the prosecution has represented that the evidence sought to be suppressed will never be used. In any event, it would be erroneous to conclude that the district court's judgment will finally resolve the issue. That prospect appears remote since there is a strong possibility of other appeals from the fact-finding proceedings which are to be conducted pursuant to the court's mandate.

It bears replication that the issue presented here is not whether a citizen is to be denied access to the federal courts for the disposition of his constitutional claims. As petitioners have maintained throughout these proceedings, a criminal prosecution followed by appeal and petition for certiorari is presumed to be an adequate remedy for significant constitutional deprivations. Further, federal habeas corpus in the event of a conviction provides an adequate vehicle for vindication of respondent's Fifth Amendment

privilege. See 28 U.S.C. §2254(d).[28] Thus, respondent is not without a federal forum for resolution of his constitutional claim.

Rather, at issue is the State's sovereign prerogative to try an accused without delay. It might well be true that the concept of two separate judicial systems is anachronistic and that the federal judiciary should bear the sole responsibility for resolution of all federal constitutional questions. Nevertheless, our Constitution, as presently interpreted, calls for a sharing of that obligation. What is required is a reconciliation of competing social values. Specifically, the tension between the right of the state courts to try state cases free of federal interference and the interest of a citizen to immediate disposition of his federal constitutional claims by a federal court must be resolved by proscribing federal intervention absent compelling reasons. The decision below, however, disrupts and demeans the State process for no other reason "than to assure Helfant of an immediate federal forum for a factual claim that may never ripen into controversy" (A165). Substantial interests of federalism are thus sac-

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[28] 28 U.S.C. §2254(d) provides in part that in federal district courts, upon an application for habeas, prior state-court findings of fact "shall be presumed to be correct" unless:

> "(2) . . . the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing; or
>
> "(6) . . . the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or
>
> "(7) . . . the applicant was otherwise denied due process of law in the State court proceeding."

If Helfant is convicted by use of improperly procured evidence, his conviction thus could be set aside by such a finding by a federal district court.

rificed not in the interest of preserving intact the right to be heard in federal court, but solely as a guarantee that that right be vindicated *instanter*. As such, the inimical decision offends basic considerations of comity and tears at the very roots of "Our federalism."

D. Respondent's Contentions.

We must emphasize at the outset that Helfant's cross-petition did not respond in any meaningful way to our arguments. Surprisingly, respondent does not even attempt to support the basis for intervention upon which the majority of the Third Circuit rested its judgment; *i.e.*, that there was a triable issue as to whether his will not to testify was overborne. Rather, Helfant's cross-petition speaks only to the false swearing counts. As we pointed out above, the majority in the court below inexplicably ignored petitioners' contention that the Fifth Amendment privilege does not immunize a grand jury witness from a perjury or false swearing prosecution, despite the fact that the dissenting opinion discussed that issue at length. Significantly, Helfant's cross-petition fails to state whether the majority in the Third Circuit in fact dealt with the false swearing issue. More than that, Helfant does not challenge the validity of the authorities which we presented and upon which the dissenting opinion relied. Rather, petitioner now advances a totally different claim. Specifically, he contends that there was "entrapment" or some violation of due process for the Attorney General to summon him before the grand jury allegedly for the sole purpose of instituting false swearing charges.

Our response to the issue Helfant belatedly seeks to inject is as follows: First, this issue is simply not in

the case. The complaint did not make this allegation, nor was such a charge advanced or accepted by either the district court or the Third Circuit. See *e.g. Tacon* v. *Arizona*, 410 U.S. 351 (1973); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Nelson* v. *City of Los Angeles*, 362 U.S. 1 (1961); *Wilson* v. *Cook*, 327 U.S. 474 (1946).

Second, there is nothing in the record to support it. In substance, Helfant contends that because the State advised him that he was a "target," it must follow that the Attorney General expected him to lie. He argues that the Attorney General summoned him before the grand jury for the sole purpose of adding the false swearing charges to the substantive counts. But to say that a witness is a "target" is not to suggest that the investigation is completed. Nor does it necessarily follow that an indictment against such a witness is a certainty. It means only that information in the possession of the grand jury may lead to an indictment. See *e.g. In re Addonizio*, 53 N.J. 107, 248 A.2d 531 (1968); *In re Boiardo*, 34 N.J. 599, 170 A. 2d 816 (1961); *State* v. *DeCola*, 33 N.J. 335, 164 A.2d 729 (1960). It is not uncommon for a "target" to accept, and even to insist upon, an opportunity to testify in the hope that an indictment will not ensue. This is especially true with respect to men in public life, as to whom the bare fact of an indictment is harmful whatever the outcome of the ultimate trial. Moreover, there is no basis in the record for a charge that the Attorney General was guilty of bad faith in summoning Helfant. *Cf. United States* v. *Devitt*, 499 F. 2d. 135, 140 (7 Cir. 1974). The only relevant part of the record in this connection is the Fifth Count of the indictment (A27-A33). There appears the testimony of Judge Moore's clerk to the effect that the judge ordered him to dismiss the complaint for atrocious assault and battery saying that the County Prosecutor had

consented to that course. The same count further notes that on October 25, 1972, Judge Moore swore before the grand jury that his clerk had lied and that he (Judge Moore) had nothing to do with the dismissal. To the contrary, Judge Moore testified that Judge Helfant was the culprit and that the latter's signature appeared on the withdrawal endorsement. Thus, the record starkly reveals that it was incumbent upon the grand jury to determine whether to indict Judge Moore or Judge Helfant or both. In light of the conflicting testimony then before the grand jury, it was fair, rather than oppressive, to summon Judge Helfant.

Third, this new allegation could not justify intervention by the federal judiciary. The focus of Helfant's attack is upon the Attorney General, not upon the Supreme Court, and thus there could be no basis to assume that the State judiciary would not fairly adjudicate the issue.

Fourth, respondent's reliance on *United States* v. *Mandujano*, 496 F.2d 1050 (5 Cir. 1974) is grossly misplaced. Indeed, in light of the facts in *Mandujano*, we are at a complete loss to comprehend how respondent could contend that "the facts of Helfant's complaint bring it squarely within the four corners of the *United States* v. *Mandujano* . . . . (C.P. 30-34).[29] The gravamen of the Fifth Circuit's due process disposition in *Mandujano* was founded on the compelling factual predicate that defendant, a target of a grand jury investigation, was neither represented by counsel nor even apprised of his rights before the testimonial appearance which resulted in his indictment for perjury. Accordingly, it strains one's sensibilities to attempt to discern any resemblance between

[29] Respondent's cross-petition is designated C.P. and addendum A of the cross-petition is designated C.P.A.

the impecunious *Mandujano*, sans *Miranda* warnings and unrepresented by counsel because he could not afford one, and Helfant, a lawyer and judge (CPA24-19) represented by not one but two attorneys (CPA8-26), who was fully informed of his rights before testifying (CPA27-14). Presumably, the compelling ambience and exigencies of criminal litigation engender much wishful thinking.

Moreover, the alluring snippets of entrapment language upon which Helfant mistakenly relies are clearly inapposite. In *United States* v. *Nickels*, 502 F.2d 1173 (7 Cir. 1974), the Seventh Circuit in rejecting the due process-entrapment rationale of *Mandujano*, cogently explained that:

> "[E]ven if the questions were asked with the expectation of perjured answers, defendant cannot complain. This is not an entrapment case . . . It was defendant's predisposition to lie his way out of his difficulties that led to this crime. The Government did not solicit or encourage perjury; at most it created a situation in which perjury appeared expedient. This is not 'so outrageous' as to bar prosecution. *United States* v. *Russell*, 411 U.S. 423, 431 . . ." *United States* v. *Nickels*, 502 F.2d at 1176.

More importantly, the limited defense of entrapment is not of constitutional dimension, *United States* v. *Russell*, 411 U.S. 423, 432 (1973), and would constitute a question of fact for the jury if litigated in a New Jersey forum. *State* v. *Dolce*, 41 N.J. 422, 432-33, 197 A.2d 185 (1964). Necessarily, the defense of entrapment would be far too weak and inappropriate a reed upon which to posit federal intervention in an ongoing state criminal prosecution.

Respondent proffers several other makeweight arguments and for the sake of completeness we will now dispose of them *seriatim*.

The cross-petition continues to urge that the Supreme Court violated the State and Federal Constitutions, by requesting the grand jury testimony and communicating with the Attorney General with regard to the status of the criminal investigation. We have already pointed out that the Supreme Court is charged by the State Constitution with the administration of the judicial system including the removal of judges and the discipline of attorneys. *Constitution of New Jersey,* Article 6, Section 6, paragraphs 2 and 3, and *Constitution of New Jersey,* Article 6, Section 7, paragraphs 1 and 2. See also, N.J. S.A. 2A:1B-1, *et seq.* We think it patently frivolous to say, as Helfant asserts here, that any constitutional concept bars this essential role. We note that the majority opinion nowhere indicated that it found any merit in that issue, for as already noted, the court below ordered intervention only with respect to the allegation that Helfant's will to plead the Fifth Amendment was overwhelmed.

As we noted earlier, no constitutional injury was presented by virtue of the Supreme Court's communications with the Attorney General. The allegations presented to the grand jury, if true, plainly justified the initiation of disciplinary proceedings against Judge Helfant, Judge Moore, or both. Surely, the Attorney General was duty-bound to apprise the Supreme Court of these serious charges. Petitioner's unsupported assertion to the contrary, the separation of powers doctrine is not offended when one branch of government cooperates with another.[30] Nor can a constitutional issue be generated by petitioner's naked assertion that there was "collusion" between the Supreme Court and the Attorney General. Surely, a litigant cannot precipitate federal intervention in a state criminal proceeding by the mere willingness to allege "collusion" or "corruption" or the like, and to rest that charge upon the mere fact that the Supreme Court took steps which are perfectly consistent with propriety and the discharge of its constitutional responsibility.

In this respect, we comment upon the footnote which appears at page 18 of the cross-petition. Helfant there says that the record does not contain proof of the communications between the Supreme Court and the Administrative Director. He further asserts that the record is barren of any evidence relating to the Supreme Court's practice of initiating disciplinary proceedings during the pendency of related criminal investigations. All of this

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[30] In point of fact, this Court has held that the Constitution's requirement that the federal government have a tripartite division has no applicability to the states. In *Dreyer* v. *Illinois,* 187 U.S. 71 (1902), the petitioner claimed that the Illinois law providing for indeterminate sentences was violative of the requirement of a separation of powers between governmental departments. The Court held that the federal Constitution did not require a division of powers in state governments and that whether a state constitution's separation of powers requirement was violated was not a federal question. This principle was reaffirmed in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 255 (1957), and has been consistently applied by the lower federal courts. See *e.g., Bennett* v. *California,* 406 F.2d 36 (9 Cir. 1969); *May* v. *Supreme Court of State of Colorado,* 374 F.Supp. 1210 (D.Col. 1974); *Puglia* v. *Cotter,* 333 F.Supp. 940 (D.Conn. 1971), aff'd 450 F.2d 1362 (2 Cir. 1971), *cert.* denied 405 U.S. 1073 (1972); *Salvaggia* v. *Cotter,* 324 F.Supp. 681 (D.Conn. 1971), aff'd 447 F.2d 1406 (2 Cir. 1971); *Avens* v. *Wright,* 320 F.Supp. 677 (W.D.Va. 1970), (three-judge court).

is a matter of record within the Supreme Court and as such may be judicially noticed. In point of fact, as we specifically noted in our petition, this practice has been recognized and approved by the Third Circuit. See *DeVita* v. *Sills*, 422 F.2d 1172 (3 Cir. 1970).[31] But even if this were not judicially noticed, it would not matter. It can be of no moment as to how the Supreme Court learned of the grand jury inquiry. Nor would it be significant if Judges Moore and Helfant were the only ones ever called into such a conference. It is perfectly sensible and reasonable to explore the possibility of an agreement not to sit pending resolution of criminal charges against a judge.

Petitioner also contends that the Supreme Court "deprived [him] of the right to counsel" (CP27-28). We do not know whether Helfant seeks to create the impression that the Supreme Court refused to permit counsel to attend the conference. If that is the thrust, then we point out that there is no such allegation in the complaint and nothing in the record to suggest a factual basis for such a charge. The right of a judge (or an attorney) to have counsel with him has never been denied, and Helfant nowhere says otherwise.

Finally, respondent's contention that the majority failed to consider his allegation of bad faith is equally unpersuasive. As already demonstrated, "bad faith" and "harassment" signify that a prosecution is being instituted with no reasonable hope or expectation of obtain-

[31] In a related context, this Court has held that civil and administrative hearings need not await the conclusion of related criminal charges. See *United States* v. *Kordel*, 397 U.S. 1 (1970). See also *United States* v. *Simon*, 373 F.2d 649 (2 Cir. 1967), *cert.* granted *Simon* v. *Wharton*, 386 U.S. 1030, vacated as moot, 389 U.S. 425 (1967).

ing a valid conviction. In no sense does respondent's conclusory allegation of "bad faith" meet this standard. Moreover, Judge Moore's testimony, as set forth in the indictment which is a part of the record in this case, plainly reveals Helfant's involvement in a criminal enterprise. Indeed, respondent's own complaint sets forth the undisputed fact that other witnesses had appeared and had testified before the grand jury and, further that their "testimony if believed would incriminate" him (A64). Consequently, no triable issue was presented with respect to the allegation of bad faith.

CONCLUSION

For the foregoing reasons, petitioners submit that the judgment of the United States Court of Appeals for the Third Circuit be reversed in all respects.

Respectfully submitted,

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